Supreme Court, U.S.
FILED

No. 96 853 NOV 21 1996

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In The

Supreme Court of the United States

October Term, 1996

MUSTANG FUEL CORPORATION, *ET AL.*,

Petitioners,

v.

VIOLA HATCH, *ET AL.*,

Respondents.

WARD PETROLEUM CORPORATION,

Petitioner,

v.

JUANITA LEARNED, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Indian country statute, 18 U.S.C. § 1151, which defines federal and tribal criminal jurisdiction, the appropriate test for determining a tribe's civil territorial jurisdiction over allotted lands lying outside of a reservation?

2. Where tribes have entered into an agreement with the United States which was ratified by Congress that provides that the tribes "cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character, in and to" the entire reservation, do the lands allotted to the individual tribal members remain within the civil territorial jurisdiction of those tribes?

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Rules of the Supreme Court, the following is the list of all Petitioners and their parent companies and nonwholly owned subsidiaries:

Petitioners	Parents/Nonwholly Owned Subsidiaries
Mustang Fuel Corporation, f/k/a Mustang Production Company	None
Amoco Production Company	Amoco Corporation Amoco Company Amoco Canada Petroleum Company, Ltd. Amoco Credit Corporation Amoco Argentina Oil Company
Anson Corporation	None
Apache Corporation	Apache Petroleum Partnership 1980-I, Ltd. Apache Offshore Investment Partnership
Phillips Petroleum Company	Phillips Gas Company, (formerly GPM Gas Corporation) Chisolm Pipeline Company Colonial Pipeline Company Dixie Pipeline Company Explorer Pipeline Company GPM Gas Gathering, L.L.C. Kenai LNG Corporation Phillips Gas Company Piro Implementation, Inc.

LIST OF PARTIES
AND
CORPORATE DISCLOSURE STATEMENT – Continued

Oryx Energy Company, as managing general partner of Sun Operating Limited Partnership	Sun Energy Partners, L.P.
Seagull Midcon Inc., successor to Mesa Midcontinent Co.	Seagull Energy Corporation
Texaco Inc.	Four Star Oil and Gas Company El Capitan Mutual Water Company
Texaco Exploration and Production, Inc. (formerly, Texaco Producing Inc.)	TEPI Holdings Inc. MVP Production Inc. Bridgeline Gas Distribution LLC
Union Oil Company of California (d/b/a Unocal)	Unocal Corporation
PG&E Resources Company	ENSERCH Corporation Enserch Exploration, Inc. Texas Utilities, Inc.
Louis Dreyfus Natural Gas Corp.	None
Kaiser-Francis Oil Company	GBK Corporation Tilco, Inc.
Unit Petroleum Company	Unit Corporation
Viersen & Cochran	None
Bracken Energy Corporation	None

LIST OF PARTIES
AND
CORPORATE DISCLOSURE STATEMENT – Continued

Santa Fe Minerals, Inc.	Santa Fe U.S. Holdings, Inc. Kuwait Petroleum Corp. U.S. Holdings Inc. Santa Fe International Corp. Netherlands Holdings B.V. Santa Fe International Corp. N.A. N.V. Santa Fe International Corp. N.A. Holdings N.V. Santa Fe International Corp. Holdings Cayman Inc. Kuwait Petroleum Corporation
Kenneth W. Cory, Ltd., successor to Kenneth W. Cory	None
Ward Petroleum Corporation	None

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PETITION FOR WRIT OF CERTIORARI

Plaintiffs, Mustang Fuel Corporation, et al., respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on August 23, 1996, in order to resolve a conflict between the Tenth Circuit and decisions from the Ninth Circuit and the New Mexico Supreme Court, to correct the erroneous legal standard announced by the Tenth Circuit, and to address an issue of first impression involving an important legal issue.

OPINIONS BELOW

The decisions of the Tenth Circuit Court of Appeals and the United States District Court for the Western District of Oklahoma are reported at:

Mustang Production Company v. Harrison, 94 F.3d 1382 (10th Cir. 1986).

Mustang Fuel Corporation v. Hatch, 890 F. Supp. 995 (W.D. Okla. 1995).

JURISDICTION

This action was commenced in the United States District Court for the Western District of Oklahoma on October 14, 1988. By agreement of the parties, an order was entered staying the action pending exhaustion of tribal remedies. An escrow account was also established to hold the disputed taxes during the pendency of this action.

Plaintiffs pursued their remedies in the tribal courts of the Cheyenne-Arapaho Tribes of Oklahoma (the "Cheyenne-Arapaho"). The Cheyenne-Arapaho District Court granted summary judgment to the Defendants by Judgment dated December 20, 1990 and its Memorandum of Law dated January 31, 1991. Copies of such documents are attached at Appendix 69 and 79. Plaintiffs appealed to the Cheyenne-Arapaho Supreme Court which announced its decision on January 3, 1994 affirming the lower court decision and entered judgment on January 5, 1994. Copies of those documents are attached at Appendix 34 and 68.

Upon entry of the decision of the Cheyenne-Arapaho Supreme Court, tribal remedies had been exhausted. Plaintiffs moved to re-open the case pending in the federal district court. The district court granted summary judgment to the Defendants by its order, as amended on July 18, 1995, and its judgment entered on the judgment docket on July 7, 1995. Copies of those documents are attached at Appendix 11 and 13. Plaintiffs filed their notice of appeal to the Tenth Circuit on August 4, 1995. The Tenth Circuit affirmed the district court by its decision entered August 23, 1996.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATIES AND STATUTES INVOLVED IN THIS CASE

The Act of March 3, 1891, 26 Stat. 989, (App. 120) ratified the Cheyenne-Arapaho Allotment and Cession Agreement, which provides in relevant part:

ARTICLE I.

The said Cheyenne and Arapahoe tribes of Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to wit: [lands described in the 1865 and 1867 treaties].

ARTICLE II

Subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapahoe tribes of Indians, as hereinafter provided for and subject to the conditions hereinafter imposed, for the considerations hereinafter mentioned the said Cheyenne and Arapahoe Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to-wit: [all lands within the entire 1869 reservation] and all other lands or tracts of country in the Indian Territory to which they have or may set up or allege any right, title, interest or claim whatsoever.

ARTICLE III.

Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II hereof, and in part consideration for the cession of lands named in the preceding article, it is agreed by the United States that each member of the said Cheyenne and Arapahoe tribes of

Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held and owned in severalty, to conform to legal surveys in boundary; and that the father, or, if he be dead, the mother, if members of either of said tribes of Indians, shall have a right to select a like amount of land for each of his or her children under the age of eighteen years; and that the Commissioner of Indian Affairs, or some one by him appointed for the purpose, shall select a like amount of land for each orphan child belonging to either of said tribes under the age of eighteen years.

18 U.S.C. § 1151 provides:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

STATEMENT OF THE CASE

A. Proceedings Below.

In 1988, the Cheyenne-Arapaho Tribes of Oklahoma ("Cheyenne-Arapaho"), acting through the Business Committee, adopted an oil and gas severance tax on all petroleum produced from any land "within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma." General Revenue and Taxation Act of 1988, § 401 (App. 82, 106). The Cheyenne-Arapaho Tax Commission, the body charged with the enforcement of the severance tax, has defined the territorial jurisdiction of the Cheyenne-Arapaho to include all "Indian country" as defined in 18 U.S.C. § 1151 within the boundaries of the 1869 reservation. Rules of the Cheyenne Arapaho Tax Commission, Rule 1.1.11 (App. 114, 118-119).

Plaintiffs are the lessees of oil and gas leases covering lands allotted to the members of the Cheyenne-Arapaho which are held in trust by the United States ("Allotted Lands"). The Tax Commission has sought to impose the severance tax against Plaintiffs with respect to their leases of Allotted Lands. Plaintiffs have brought this action challenging the civil territorial jurisdiction of the Cheyenne-Arapaho to impose the severance tax on non-members who are lessees under leases covering Allotted Lands. Plaintiffs have not challenged the authority of the Cheyenne-Arapaho to impose the severance tax on tribal lands which reacquired the status of reservation.

Plaintiffs commenced this action in the federal district court asserting that the individual defendants, as members of the Cheyenne-Arapaho Tax Commission and Business Committee, acted beyond the scope of their

authority when they adopted the severance tax and sought to enforce the tax against Plaintiffs with respect to the Allotted Lands. Accordingly, the Defendants are not protected by sovereign immunity. *See Tenneco Oil Company v. Sac and Fox Tribe of Indians of Oklahoma*, 725 F.2d 572 (10th Cir. 1984). The determination of the extent of the civil territorial jurisdiction of the Cheyenne-Arapaho is a federal question vesting jurisdiction in the district court pursuant to 28 U.S.C. § 1331. *See National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985); *Texaco, Inc. v. Zah*, 5 F.3d 1374 (10th Cir. 1993). The federal court action was stayed and Plaintiffs agreed to exhaust tribal remedies before proceeding further in federal court. Tribal remedies have now been exhausted.

In the Cheyenne-Arapaho District Court, the District Court granted summary judgment in favor of the Defendants and denied summary judgment to Plaintiffs holding that the Cheyenne-Arapaho do have civil territorial jurisdiction over nonmembers to impose the severance tax with respect to Allotted Lands (1) because tribes generally have the power to impose an oil and gas severance tax and the Cheyenne-Arapaho reservation has not been disestablished, and (2) because the Cheyenne-Arapaho retain civil jurisdiction over nonmembers with respect to "Indian country" and the Allotted Lands are Indian country. *See* Memorandum of Law and Judgment of District Court (App. 69 and 79).

Plaintiffs appealed the decision of the District Court to the Cheyenne-Arapaho Supreme Court, which affirmed holding that the Cheyenne-Arapaho retained jurisdiction over the Allotted Lands because they had

been validly set apart for use by the Cheyenne-Arapaho and constituted Indian country under 18 U.S.C. § 1151. The Court specifically did not address the issue of the disestablishment of the reservation. *See* Opinion of Supreme Court and Judgment (App. 34 and 68).

Upon exhaustion of tribal remedies, Plaintiffs reopened this action in the federal district court. Both Plaintiffs and the Defendants moved the court for summary judgment. The district court granted judgment for the Defendants holding that the Cheyenne-Arapaho may impose the severance tax on the Allotted Lands. On appeal to the Tenth Circuit, the Tenth Circuit affirmed holding that the Cheyenne-Arapaho had civil jurisdiction over the Allotted Lands because they were Indian Country under 18 U.S.C. § 1151.

B. Statement of Facts

Pursuant to two treaties with the Cheyenne-Arapaho in 1865 and 1867, as clarified by the Executive Order of August 10, 1869, the Cheyenne-Arapaho were located upon a reservation in what is now generally seven counties in western Oklahoma. *See* Treaty of October 14, 1865, 14 Stat. 703; Treaty of October 28, 1867, 15 Stat. 593; Executive Order of August 10, 1869, reprinted in I Kappler, Indian Affairs, Laws and Treaties 841.

Pursuant to the Allotment and Cession Agreement of October, 1890 (the "Allotment and Cession Agreement"), the Cheyenne-Arapaho ceded, conveyed, transferred, relinquished and surrendered, forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest of every kind and character,

in and to the entire 1869 reservation. Out of the lands that were ceded, conveyed, transferred, relinquished, and surrendered, the individual members were allotted certain tracts of land. *See* Allotment and Cession Agreement (App. 120-122). After completion of the allotment process to the individual members of the Cheyenne-Arapaho, the "surplus" lands, constituting approximately 94% of the original reservation, were opened to settlement by non-members on April 19, 1892. As a result of the Allotment and Cession Agreement, the Cheyenne-Arapaho reservation was disestablished and terminated and the Cheyenne-Arapaho ceased to exercise jurisdiction over that territory, except as specifically authorized by Congress for criminal jurisdiction. *See* Affidavit of Donald E. Green, ¶ 9, (II Aplt. App. 151).[1]

The Allotted Lands are scattered in a checkerboard fashion throughout western Oklahoma. The former reservation is platted into farms and ranches, small and large, along with towns and small cities. Well over 90% of the landowners are non-Indians. The Allotted Lands are indistinguishable from the non-Indian lands except for the status of the title to the land. *See* Affidavit of Donald E. Green, ¶ 15 (II Aplt. App. 155).

The Cheyenne-Arapaho have reorganized their tribal government pursuant to the provisions of the Oklahoma Indian Welfare Act, 25 U.S.C. § 501, *et seq.*, and have reacquired certain land which is held by the United States in trust for the tribe as reservation land. *See Cheyenne-*

---

[1] References to "Aplt App" are to the Appellants' Appendix filed in the Tenth Circuit.

Arapaho Tribes of Oklahoma v. State of Oklahoma, 618 F.2d 665, 667-668 (10th Cir. 1980). However, no legislative enactment has restored the civil territorial jurisdiction of the Cheyenne-Arapaho over Allotted Lands.

ARGUMENT AND AUTHORITIES

I. THE TENTH CIRCUIT'S DECISION RELYING UPON THE INDIAN COUNTRY STATUTE TO DEFINE CIVIL TERRITORIAL JURISDICTION IS IN DIRECT CONFLICT WITH A PRIOR DECISION OF THE NINTH CIRCUIT AND A PRIOR DECISION OF THE NEW MEXICO SUPREME COURT, AND IS CONTRARY TO STANDARD PRINCIPLES OF STATUTORY CONSTRUCTION.

The issue which this Court is being asked to resolve is what is the proper test to determine when an Indian tribe may exercise civil territorial jurisdiction over non-members on land outside of a reservation. The Cheyenne-Arapaho have defined their civil territorial jurisdiction to include all Indian country as defined by 18 U.S.C. § 1151. The Tenth Circuit has approved that test, which holding is in direct conflict with a decision of the Ninth Circuit and a decision of the New Mexico Supreme Court, and is contrary to established principles of statutory construction.

It is fundamental that the jurisdiction of any government is limited to jurisdiction over its citizens or members and jurisdiction over its territory. No government can exercise jurisdiction over noncitizens outside of that sovereign's territory. As the Supreme Court stated in

Hilton v. Guyot, 159 U.S. 113, 163, 16 S.Ct. 139, 40 L.Ed. 95, 108 (1895):

> No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.

The jurisdiction of an Indian tribe is similar to that of any other government. An Indian tribe only has jurisdiction over its members and its territory. *United States v. Mazurie*, 419 U.S. 544, 557, 95 S.Ct. 710, 42 L.Ed.2d 706, 716 (1975); *Iowa Mutual Insurance Company v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987). The territorial limitation of a tribal government was recognized by the Supreme Court as early as 1834 where the Court in *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, 559-561, 8 L.Ed. 483, 500-501 (1832) described Indian tribes as

> distinct, independent political communities, retaining their original natural rights. . . .
>
> . . .
>
> The Cherokee Nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force. . . .

The Supreme Court has consistently recognized this territorial limitation on the power of an Indian tribe to impose a tax or to otherwise exercise civil jurisdiction over a nonmember. In *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130, 141-42, 102 S.Ct. 894, 904, 71 L.Ed.2d 21, 32 (1982) (emphasis added), the Court recognized the territorial limitation as follows:

> a tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege

> of trade or other activity on the reservation to which the tribe can attach a tax. This limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because *the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands* or conducts business with the tribe.

Like any other government, an Indian tribe cannot impose legislation or exercise jurisdiction over nontribal members outside of that tribe's territorial jurisdiction.

The Tenth Circuit has used Indian country as the test to define the civil territorial jurisdiction of the Cheyenne-Arapaho. In its opinion, the Tenth Circuit stated: "In order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country." 94 F.3d at 1385. The Tenth Circuit relied upon its earlier decision in *Pittsburg & Midway Coal Mining Company v. Watchman*, 52 F.3d 1531, 1541 (10th Cir. 1995) (emphasis added) which held:

> We conclude these precedents establish 18 U.S.C. § 1151 defines Indian country for civil jurisdictional purposes. We hold § 1151 represents an *express Congressional delegation of civil authority over Indian country to the tribes.*

The Tenth Circuit's reliance upon Section 1151 to define a tribe's civil jurisdiction is in direct conflict with the Ninth Circuit's holding that Section 1151 does not apply in a civil context. In *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1215 (9th Cir.

1990), *aff'd and remanded*, 502 U.S. 251, 12 S.Ct. 683, 116 L.Ed.2d 687 (1992), the Ninth Circuit rejected the application of the Indian country statute in a civil context stating:

> The broad definition of 'Indian country' in this statute reflects an attempt by Congress to 'remove the uncertainty' as to the limits of federal criminal jurisdiction over Indian territory. . . .
>
> . . . Yet, while we acknowledge that section 1151 governs fee patented land for purposes of criminal jurisdiction, we do not consider section 1151 relevant to the question of whether fee patented land may be taxed by the state. The taxing power is an exercise of the state's civil, rather than its criminal authority, and is governed by a noncriminal federal statutory scheme . . . We conclude that 18 U.S.C. § 1151 does not disallow Yakima County's taxing power under 25 U.S.C. § 349.

The same result was reached in *General Motors Acceptance Corporation v. Chischilly*, 628 P.2d 683 (N.M. 1981). In that case, the tribe had acquired land in trust outside its reservation boundaries. The tribe claimed jurisdiction over a nonmember asserting that because the trust land was Indian country, the tribe had civil jurisdiction. The court rejected this argument holding at 628 P.2d at 685:

> Title 18 U.S.C. § 1151 merely defines the geographic area over which the federal government, and to a lesser extent the tribal government, may exercise criminal jurisdiction. . . . Section 1151 cannot be read to grant the tribe authority to enact ordinances . . . which would extend their civil jurisdiction over non-Indians.

On the contrary, the New Mexico Supreme Court held that there must be an "express federal delegation" to extend civil territorial jurisdiction. 628 P.2d at 685. *See also, People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870 (D. Alaska 1979).

Thus, the Tenth Circuit's decision is in direct conflict with decisions of both the Ninth Circuit and the New Mexico Supreme Court concerning the application of the Indian country statute to define a tribe's civil territorial jurisdiction. Certiorari should be granted to resolve this conflict.

The Tenth Circuit's reliance upon Section 1151 to define a tribe's civil territorial jurisdiction is also directly contrary to established principles of statutory construction. Section 1151 appears in Title 18 of the United States Code which deals exclusively with crimes and criminal procedure. Chapter 53 of Title 18, 18 U.S.C. §§ 1151-1165, defines certain crimes on Indian lands and establishes jurisdiction for those crimes in either the federal or tribal government. *See, Negonsott v. Samuels*, 507 U.S. 99, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993). Section 1151 does not even mention civil jurisdiction and therefore cannot be an "express congressional delegation of civil authority over Indian country to the tribes."

The Supreme Court has clearly stated the rules to follow when construing a statute. In *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525, 535 (1993), the Court stated:

> In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of 'a clearly

> expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'

In *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391, 397 (1992), the Court stated:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Further, in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 103 L.Ed.2d 290, 298 (1989), the Court held:

> [W]here, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.' *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

The Indian country statute, on its face, only deals with criminal jurisdiction. While Congress has plenary authority over Indian tribes and could grant tribes civil territorial jurisdiction over Indian country, Congress has not done so to date. Courts may not rewrite Congressional legislation to cover a situation not provided for in the statute. *King Ranch, Inc. v. United States*, 946 F.2d 35, 37 (5th Cir. 1991). Because the Indian country statute does not even address civil jurisdiction of a tribe, the Tenth Circuit's holding that Section 1151 constitutes the proper test for determining civil territorial jurisdiction is erroneous.

In relying upon the Indian country statute, the Tenth Circuit noted this Court's earlier decisions concerning

Indian country. The original case which indicated that Indian country might be helpful in defining civil territorial jurisdiction is *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). All subsequent cases have relied on *DeCoteau*. In footnote 2, the Court stated (emphasis added):

> While § 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it *generally* applies as well to questions of civil jurisdiction.

This statement by the Court is nothing more than a general observation of the usual situation and does not provide a test for determining whether a particular tribe has retained civil jurisdiction over specified lands. The Court did not say that Indian country always defines the civil territorial jurisdiction of a tribe, but rather that it "generally applies." This necessarily means that there will be situations where the definition of Indian country does not apply to define a tribe's civil territorial jurisdiction. That is precisely the situation with the Cheyenne-Arapaho. A comparison of the allotment and cession agreements by the Sisseton and Wahpeton Indians of the Lake Traverse Reservation involved in *DeCoteau* with the Cheyenne-Arapaho Allotment and Cession Agreement reveals why Indian country would be applicable to the Sisseton and Wahpeton tribes for civil jurisdictional purposes, but not applicable to the Cheyenne-Arapaho. The Sisseton and Wahpeton tribes never ceded or relinquished control over their allotted lands as opposed to the Cheyenne-Arapaho who specifically relinquished

control over their Allotted Lands. The Sisseton and Wahpeton agreement provides:

> Article I
>
> The Sisseton and Wahpeton bands of Dakota or Sioux Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title, and interest in and to *all the unallotted lands* within the limits of the reservation set apart to said bands of Indians as aforesaid *remaining after the allotments* and additional allotments provided for in article four of this agreement shall have been made.

DeCoteau, supra 420 U.S. at 456, 43 L.Ed.2d at 321 (emphasis added). The Sisseton and Wahpeton tribes did not relinquish control over all of their lands, but specifically retained control over the allotted lands. They only relinquished control over the *unallotted lands remaining after the allotments* had been made.

This agreement stands in stark contrast to the Cheyenne-Arapaho Allotment and Cession Agreement which provides that the Cheyenne-Arapaho ceded and relinquished control over *all of their lands* and that the allotments were then made *out of* the lands so ceded. See the text of the Allotment and Cession Agreement discussed in Part II below. The Sisseton and Wahpeton agreement is the more common form of agreement so Indian country will "generally" be coextensive with a tribe's retained civil jurisdiction. However, where the tribe has relinquished control over particular territory, the Indian country statute cannot be used to restore civil territorial jurisdiction. By adopting the Indian country statute as a bright-line test, the Tenth Circuit has effectively rewritten

history to restore jurisdiction to tribes when Congress has previously acted to remove that jurisdiction. This Court should clarify the applicability of the Indian country statute to define a tribe's civil territorial jurisdiction.

II. THE TENTH CIRCUIT'S DECISION IS INCONSISTENT WITH PRIOR SUPREME COURT PRECEDENT.

Rather than using Indian country as a bright-line test, the determination of the extent of a tribe's jurisdiction must be made on a case-by-case basis through a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions. *National Farmers Union Insurance Companies v. Crow Tribe of Indians*, 471 U.S. 845, 855-56, 105 S.Ct. 2447, 2543, 85 L.Ed.2d 818 (1985). The Tenth Circuit's decision failed to conduct this analysis and to give effect to prior Supreme Court precedent, including *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed. 716 (1943), which recognized that allotted lands from a disestablished reservation may have different jurisdictional characteristics from allotted lands where the reservation was merely diminished.

An examination of relevant case law, the Allotment and Cession Agreement and the relevant history surrounding that Agreement reveals that the Cheyenne-Arapaho reservation was completely disestablished and terminated, even with respect to the Allotted Lands, and

therefore the Cheyenne-Arapaho lost territorial jurisdiction with respect to all of those lands.

A. Congressional Policy

Federal Indian policy in the 1880's and early 1890's called for the termination of reservations, the breakup of tribal governments and tribal relations, and the location of tribal members on individual allotments interspersed among white neighbors so that tribal members could become assimilated into white society. This policy resulted in passage of the General Allotment Act (Act of February 8, 1887, 24 Stat. 388). The policy of breaking up the tribal governments and dissolving the tribal relations has been recognized by the Supreme Court in *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 253-254, 112 S.Ct. 683, 116 L.Ed.2d 687, 695 (1992) (emphasis added):

> In the late 19th century, the prevailing national policy of segregating lands for the exclusive use and control of the Indian tribes gave way to a policy of allotting those lands to tribe members individually. The objectives of allotment were simple and clear cut: *to extinguish tribal sovereignty, erase reservation boundaries*, and force the assimilation of Indians into the society at large.

B. The Allotment and Cession Agreement

Pursuant to the General Allotment Act, Congress authorized formation of the Jerome Commission to negotiate with various tribes, including the Cheyenne-Arapaho, "for the cession to the United States of all their title,

claim or interest of every kind or character in and to said lands." Indian Appropriations Act of March 2, 1889, 25 Stat. 980, 1005. *See also* Instructions to the Jerome Commission (III Aplt. App. 199). The Jerome Commission negotiated with the members of the Cheyenne-Arapaho for the termination of their reservation which resulted in the Allotment and Cession Agreement.

The language of the Allotment and Cession Agreement is specifically designed to accomplish the Congressional purpose of the termination of the *entire* reservation. Article I of the Agreement provides that the Cheyenne-Arapaho

> hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest of every kind and character

in and to the lands described in the 1865 and 1867 treaties with the Cheyenne-Arapaho. Article II of the Agreement uses the *identical language* with respect to the 1869 reservation and provides (emphasis added):

> Subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapahoe tribes of Indians, as hereinafter provided for and subject to the conditions hereinafter imposed, for the considerations hereinafter mentioned the said Cheyenne and Arapahoe Indians *hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character,* in and to [the lands within the entire 1869 reservation] and all other lands or tracts of country

> in the Indian Territory to which they have or may set up or allege any right, title, interest or claim whatsoever.

The Agreement dealt with three categories of land: (1) lands within the 1865 and 1867 treaties, (2) lands within the 1869 reservation, and (3) all other land within the Indian Territory to which they might claim an interest. The Agreement clearly terminated any claim the Cheyenne-Arapaho might have to categories 1 and 3 and the Cheyenne-Arapaho have never claimed any further interest therein. The Agreement uses the *identical language* in dealing with the tribes' interest in the 1869 reservation. Clearly, the Agreement terminated "all [the tribes'] claim, title and interest, of every kind and character" in the 1869 reservation. *See Ellis v. Page*, 351 F.2d 250, 252 (10th Cir. 1965) (the Cheyenne-Arapaho Allotment and Cession Agreement "evinces a manifest purpose to dissolve tribal government"); *Ellis v. Oklahoma*, 386 P.2d 326 (Okla. Crim. 1963) (the Agreement "dissolved the Cheyenne-Arapaho reservation as such"); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

The intent to terminate the reservation and eliminate the tribes' interest in all lands, including Allotted Lands, rather than merely diminishing the reservation to retain the Allotted Lands under the authority of the tribes is further demonstrated by how the allotments were created. Article III of the Agreement provides for the individual allotments to be taken "out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II hereof." The Agreement provided for the allotment of lands "out of" the lands to which the Cheyenne and Arapaho had relinquished all claims. Further, the

allotments were made to the *individual members* of the tribes, not to the tribes themselves.

The Defendants have argued and the Tenth Circuit found that the phrase "[s]ubject to the allotment of land in severalty to the individual members" is a modification of the scope of the Agreement and reflects an intent to leave the Allotted Lands within the jurisdiction of the tribes. This argument, however, ignores the distinction between the individual members and the tribes. The allotments were not made to the *tribes*, but to the *individual members*. The tribes did not retain jurisdiction over the lands or any interest therein, but rather surrendered "forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character, in and to" the *entire* reservation, thus removing all lands, including the Allotted Lands, from the jurisdiction of the tribes. This was entirely consistent with Congressional policy to dissolve tribal government and tribal relations and give the individual members separate property so that they could develop their independence and become citizens. While the Cheyenne-Arapaho may wish that the Agreement were different, the Agreement was ratified by an Act of Congress and cannot be ignored.

C. Supreme Court Precedent

The issue of whether allotted lands retain their character as reservation lands under an allotment and cession agreement nearly identical to the Cheyenne-Arapaho Allotment and Cession Agreement was addressed by the Supreme Court in *United States v. Oklahoma Gas & Electric*

Co., 318 U.S. 206, 63 S.Ct. 534, 87 L.Ed. 716 (1943). At issue in that case was whether the allotted lands from the former Kickapoo reservation retained their reservation status. The Court specifically noted that there may be situations where allotted lands retain their character as reservation lands stating at 318 U.S. at 215:

> We have no purpose to decide anything more than the case before us. We do not say that "reservation" may never include allotted lands; all we hold is that if there is a distinction in fact, that distinction is carried into the Act. So we turn to the question whether these particular allotted lands were within or without a "reservation."

The Court then reviewed the Kickapoo allotment and cession agreement noting its language, which is nearly identical to the Cheyenne-Arapaho agreement, whereby the tribe did "cede, convey, transfer and relinquish, forever and absolutely, without any reservation whatever, all their claim, title and interest" to the reservation lands. 318 U.S. at 216. The Court then held at 318 U.S. at 216 (emphasis added):

> Thus, *the Kickapoo reservation was obliterated, the tribal lands were no more, and only individual allotments survived.* We think it clear that the term "reservation" as used in the statutes in question had no application to such lands.

Further, the Court specifically distinguished the Kickapoo allotted lands where the tribe retained no interest from allotted lands of other tribes where the tribes had retained an interest stating at 318 U.S. at 217:

> The dissolution of the reservation distinguishes the situation before us from that before the court relating to the allotted lands within the Tulalip Reservation, *United States v. Celestine*, 215 U.S. 278, 54 L.Ed. 195, 30 S. Ct. 93; allotted lands within the Yakima Reservation, *United States v. Sutton*, 215 U.S. 291, 54 L.Ed. 200, 30 S. Ct. 116; those within the Colville Reservation, *United States v. Pelican*, 232 U.S. 442, 58 L.Ed. 676, 34 S. Ct. 396; and the many situations in which the Departmental rulings have held that the phrase "Indian, or other reservation" includes individual allotments.

This decision has been applied directly to the Cheyenne-Arapaho Allotted Lands. In "Status of Allotted Lands of Tribes Organized Under Oklahoma Indian Welfare Act," 59 L.D. 1 (Jan. 11, 1945) (IV Aplt. App. 379), the Interior Department noted that there were no material differences between the Kickapoo and the Cheyenne-Arapaho allotment and cession agreements. The Interior Department concluded that the Cheyenne-Arapaho "ceded lands, including the allotments subsequently made, ceased to be a 'reservation.' "

Thus, existing Supreme Court precedent notes that the jurisdictional characteristics of allotted lands may vary, depending upon the particular history of that tribe. The Tenth Circuit decision ignored this precedent holding instead that all allotted lands are within a tribe's jurisdiction by virtue of their status as Indian country.

III. THIS IS A CASE OF FIRST IMPRESSION INVOLVING THE IMPORTANT LEGAL ISSUE OF THE STANDARD FOR DEFINING THE CIVIL TERRITORIAL JURISDICTION OF AN INDIAN TRIBE OVER LAND OUTSIDE OF A RESERVATION.

This is the first case involving a decision on the merits concerning the scope of the authority of an Indian tribe to exercise civil jurisdiction with respect to non-tribal members on lands lying outside of a reservation. This issue represents an important element in the development of Indian law jurisprudence and should be resolved by this Court on a definitive basis.

Having a definitive resolution of the standard to be used in determining the civil territorial jurisdiction is important for numerous reasons. If territory is within a tribe's jurisdiction, the tribe may not only tax activity on that land, but may exercise other forms of civil jurisdiction such as imposing environmental regulation, employment regulation, or other types of regulations. The issue also affects the jurisdiction of tribal, federal and state courts to resolve disputes. In the present case, the taxes which have already been paid into the escrow account and which are at issue exceed $4,800,000. Substantial additional taxes will accrue in the future.[2]

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[2] In addition to the oil and gas severance taxes imposed by the Cheyenne-Arapaho, the State of Oklahoma continues to impose and collect its own severance tax. *See Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). Accordingly, Plaintiffs have been subjected to double taxation on the production from the Allotted Lands. Such double taxation causes the oil and gas wells on Allotted

This case also has broad application to other Indian tribes. In Oklahoma alone, there are approximately 39 tribes, many of which have allotment and cession agreements similar to the Cheyenne-Arapaho Allotment and Cession Agreement. Therefore, the allotted lands of those tribes also lie outside of an established reservation. Many of those tribes have adopted oil and gas severance taxes or have otherwise sought to exercise civil jurisdiction over nonmembers with respect to allotted lands. Several lawsuits are pending in tribal or federal court over the jurisdictional issue.

The Tenth Circuit's decision is also extremely important because of the practical problems which it creates. A government's jurisdiction should be fixed, not subject to change, so that parties will know whether they are subjecting themselves to that government's jurisdiction. By using the Indian country statute to define civil jurisdiction, the Tenth Circuit has left the jurisdiction of the Cheyenne-Arapaho subject to great change. According to the Tenth Circuit, land is automatically within the civil jurisdiction of the Cheyenne-Arapaho if that land is allotted land, *i.e.*, land held by the United States in trust for a tribal member. However, under the Oklahoma Indian Welfare Act, 25 U.S.C. § 501, which is applicable to Oklahoma tribes, the Secretary of the Interior may acquire or exchange land, within or without existing reservations, for a tribe or individual members. Thus, any time an existing allottee decides to move and trade lands or a tribal member acquires new land in trust, regardless of

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Lands to be less economic and discourages companies from doing business on Allotted Lands.

location, the jurisdiction of the Cheyenne-Arapaho changes.

The Supreme Court has previously addressed the issue of when a state may exercise jurisdiction over Indian lands, including allotted lands, in *Oklahoma Tax Commission v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) and *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993). Those cases are not dispositive of the present case. First, the issue involved in those cases was the extent to which a *state* could exercise jurisdiction, while the present case involves the extent to which a *tribe* may exercise jurisdiction. State and tribal jurisdiction are not mutually exclusive. Under certain circumstances, both states and tribes may exercise authority over the same lands. *See, e.g., Cotton Petroleum Corporation v. New Mexico*, 490 U.S. 163, 109 S.Ct. 1698, 104 L.Ed.2d 209 (1989). The United States maintains a trust relationship with both the individual members and the tribes. This trust relationship creates an equally compelling reason for allotted lands to be free from state regulation, regardless of whether such lands are subject to tribal jurisdiction. Therefore, one must determine the scope of tribal jurisdiction independent of state jurisdiction.

Second, the two *Oklahoma Tax Commission* cases do not control the outcome of the present action because land set aside for individual tribal members does not necessarily remain subject to tribal jurisdiction. In the *Citizens Band Potawatomi* case, the Court held that the lands were free from state taxation because they had been "validly set apart for the use of the Indians." 498 U.S. at 511. While that test is appropriate in determining

whether a state's taxation and regulation would interfere with the trust relationship between the United States and both the tribes and their members, the test is not applicable for determining tribal jurisdiction where the tribe has specifically relinquished all claim to the land. In the present case, the Cheyenne-Arapaho in the Allotment and Cession Agreement relinquished and surrendered "forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character" to the entire reservation. The allotments were not made to the tribes, but "to the individual members." A government's jurisdiction is not determined by where its citizens happen to own land, but rather by its boundaries. The State of Oklahoma does not have jurisdiction over land in Texas, even if that land is owned by an Oklahoma citizen. An Indian tribe is not different. The fact that tribal members have an interest in the Allotted Lands does not necessarily mean the Cheyenne-Arapaho, as *tribes*, retained any interest. To the contrary, such interest was specifically disclaimed.

CONCLUSION

Plaintiffs urge the Court to grant certiorari to resolve the conflict between the Tenth Circuit and the Ninth Circuit and the New Mexico Supreme Court over the proper standard to be used in deciding the civil territorial jurisdiction of an Indian tribe. In particular, the Tenth Circuit has wrongly adopted the Indian country statute, a criminal statute, as the test to determine civil jurisdiction. Further the Tenth Circuit's decision is inconsistent with

prior Supreme Court precedent which recognizes that allotted lands may have different jurisdictional characteristics depending upon the history of the particular tribe.

This is the first case to come before this Court concerning the extent to which a tribe may exercise civil jurisdiction over allotted lands lying outside of a reservation. This is an important issue and represents a significant missing link in Indian law jurisprudence. Plaintiffs urge the Court to use this opportunity to resolve this important legal issue.

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MUSTANG PRODUCTION COMPANY, et al.,	)	
Plaintiffs - Appellants,	)	
v.	)	No. 95-6287
ALTON HARRISON, et al,	)	
Defendants - Appellees.	)	
and	)	
WARD PETROLEUM CORPORATION,	)	
Plaintiff - Appellant,	)	
v.	)	No. 95-6292
JUANITA LEARNED, et al,	)	
Defendants - Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(D. Ct. Nos. CV-88-1801 & CV-88-1954)

(Filed Aug. 23, 1996)

Steven W. Bugg (Stanley L. Cunningham, with him on the briefs), McAfee & Taft, Oklahoma City, Oklahoma, appearing for the Appellants.

Melody L. McCoy, Native American Rights Fund, Boulder, Colorado, appearing for Appellees.

Elizabeth Anne Peterson, Attorney, Department of Justice (Lois J. Schiffer, Assistant Attorney General, Bradley Scott Bridgewater and Edward J. Shawaker, Attorneys, Department of Justice, and Barbara Coen, Of Counsel, Office of the Solicitor, with her on the brief), appearing for amicus curiae United States of America.

Before TACHA, MCWILLIAMS, and MURPHY, Circuit Judges.

TACHA, Circuit Judge.

The issue in this case is whether the Cheyenne-Arapaho Tribes of Oklahoma ("the Tribes") may impose a severance tax on oil and gas production on allotted lands held in trust for their members. The appellants are nineteen oil and gas companies and one individual (collectively referred to as "Mustang") who hold oil and gas leases on the allotted lands. The appellees are members of the Business Committee and the Tax Commission, the tribal government entities responsible for promulgating and enforcing the tax at issue. The Cheyenne-Arapaho District Court ("the Tribal Court"), the Tribal Supreme Court, and the federal district court all held that allotted lands are subject to taxation by the Tribes. *Mustang Fuel Corp. v. Hatch*, 890 F. Supp. 995 (W.D. Okla, 1995) (district court opinion in this case). Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

BACKGROUND

In 1865, the United States signed a treaty creating a reservation for the Tribes in western Oklahoma. An 1869 Executive Order implemented the treaty and delineated the boundaries of the reservation ("the 1869 reservation"). In 1890, the United States and the Tribes signed an Allotment and Cession Agreement ("the Agreement"), the subject of which was the land within the 1869 reservation as well as other land which had been mistakenly reserved to the Tribe by a treaty signed in 1867. The Agreement took effect by an Act of Congress on March 3, 1891 ("the Act").

Article I of the Act provided that the Tribes would cede to the United States all land mistakenly reserved to the Tribes in the 1867 treaty. Article II stated that, subject to the allotment of land to individual members of the Tribes, the Tribes would cede all land within the boundaries of the 1869 reservation. Article III provided allotments of land to all members of the Tribe "out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II." The allotted lands were to be held in trust by the federal government for individual members of the Tribe. All of the allotted lands involved in this case continue to be held in trust.

In April 1988, the Tribes enacted a General Revenue and Taxation Act ("the Tax Act"), which taxes, among other things, oil and gas "produced, severed, saved, and removed from any land within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma." Tax Act §§ 401 & 402. Taxpayers may pay under protest, in which case the disputed money is held in a separate account pending

final resolution of their protest. Tax Act § 118. After exhausting administrative remedies, a taxpayer may bring an action in tribal court to recover any taxes, penalties, or interest paid under protest or to enjoin the Tax Commission from collecting disputed revenues. Tax Act §§ 151-155.

The Tribes taxed Mustang for oil and gas that Mustang extracted on allotted lands pursuant to oil and gas leases. In 1988, Mustang filed this suit in federal district court challenging the Tribes' authority to tax oil and gas production on allotted lands. The court stayed the action pending Mustang's exhaustion of tribal remedies. In 1989, the Tribal Court held that allotted lands are "a part of the Cheyenne and Arapaho Indian reservation, and that said allotments are 'Indian Country' as the term is defined by federal law, and that said allotments are subject to taxation by the tribal government." The Tribal Supreme Court affirmed, and further held that Congress has not divested the Tribes of their inherent authority to tax activities that occur on allotted lands.

After Mustang exhausted its tribal remedies, the district court reopened the case and granted summary judgment in favor of the Tribes. The court held that allotted lands are Indian country, and thus subject to tribal jurisdiction and the Tribes' inherent authority to tax activities on tribal lands. *Mustang*, 890 F. Supp at 1001-03. Mustang appeals, arguing that under the 1890 Agreement, the Tribe lost jurisdiction over all of the lands in the 1869 reservation, including lands allotted to individual tribal members.

DISCUSSION

I. Standard of Review

This Circuit has never decided what standard a federal court should use to review a tribal court decision regarding tribal jurisdiction. The district court did not clearly articulate what standard it used to review the Tribal Supreme Court's ruling, but noted that the Tribal Supreme Court's decision was "helpful" in resolving the issue in this case. *Id.* at 999-1000. Mustang urges us to adopt the standard articulated by the Ninth Circuit in *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1313-14 (1990), which requires deference to a tribal court's findings of fact and de novo review of its conclusions of law.

In *FMC*, the Ninth Circuit relied on the Supreme Court's decision in *National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985), to determine the appropriate standard of review. Pointing to the Supreme Court's statement that "the orderly administration of justice in the federal court will be served by allowing a full record to be developed in the Tribal Court," *id.* at 856, the *FMC* court reasoned that a tribal court's factual findings should be reviewed for clear error, 905 F.2d at 1313. The Supreme Court further stated in *National Farmers Union* that mandatory exhaustion of tribal court remedies is helpful because it provides other courts with the "benefit of their expertise." 471 U.S. at 857. The Ninth Circuit interpreted this to mean that while federal courts may be guided by a tribal court's expertise, they have no obligation to defer to a tribal court's decision, and thus legal questions should be reviewed de novo. *FMC*, 905 F.2d at 1313-14.

We are persuaded by the Ninth Circuit's analysis. We hold that when reviewing tribal court decisions on jurisdictional issues, district courts should review tribal courts' findings of fact for clear error and conclusions of law de novo. Although the district court was imprecise as to what standard it applied in this case, we are satisfied that the court deferred to the tribal court's findings of fact and reviewed de novo the legal question of tribal jurisdiction over allotted lands.

II. Tribal Jurisdiction Over Allotted Lands

Mustang argues that the Tribes do not have authority over the allotted lands and thus cannot tax oil and gas production on those lands. Mustang contends that the Tribes lost jurisdiction over all of the lands in the 1869 reservation, including allotted lands, when the 1890 Agreement disestablished the reservation. According to Mustang, when the Agreement set aside allotted lands for individual tribal members, it also divested the Tribe of its jurisdiction over those lands.

As the district court correctly concluded, however, disestablishment of the reservation is not dispositive of the question of tribal jurisdiction. *Mustang*, 890 F. Supp. at 1001. In order to determine whether the Tribes have jurisdiction we must instead look to whether the land in question is Indian country. *See Indian Country U.S.A. Inc. v. Oklahoma*, 829 F.2d 967, 973 (10th Cir. 1987) ("[T]he Indian country classification is the benchmark for approaching the allocation of federal, tribal and state authority with respect to Indians and Indian lands."). Indian country encompasses those areas that have been

"validly set apart for the use of the Indians as such, under the superintendence of the Government." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) (quoting *United States v. John*, 437 U.S. 634, 648-49 (1978)).

In *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993), the Supreme Court specifically stated that "Indian allotments, whether restricted or held in trust by the United States," are Indian country. In that case, the state argued that members of the Sac and Fox Nation were subject to state taxation because an 1891 treaty disestablished their reservation. *Id.* at 1889. The Court rejected this argument and held that "a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' " *Id.* at 1991.

Mustang argues that *Sac and Fox Nation* does not apply because the issue in that case was a state's, rather than a tribe's, civil jurisdiction. We agree with the district court, however, that "[t]he issue is analogous – whether one government can tax citizens of another government engaging in activities on allotted lands." *Mustang*, 890 F. Supp. at 1001. "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Potawatomi Indian Tribe*, 498 U.S. at 509 (quoting *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1881)). The sovereign authority of Indian tribes includes the inherent power to tax non-Indians who conduct business on tribal lands and who benefit from governmental services provided by the tribes. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137, 140-41 (1982). As discussed above, Indian tribes have jurisdiction over

lands that are Indian country, and allotted lands constitute Indian country. *See DeCoteau v. District County Court*, 420 U.S. 423, 446 (1975) (noting that allotments provide "an adequate fulcrum for tribal affairs" and that there is "exclusive tribal and federal jurisdiction" over allotted lands). Thus, we agree with the district court that the Tribes have "an inherent sovereign power to tax economic activities on their lands, and because the allotted lands are within their jurisdiction, the Tribes have the power to enact and enforce a severance tax on oil and gas production from allotted lands." *Mustang*, 890 F. Supp. at 1003.

Mustang argues that the Tribes would have authority over allotted lands only if Congress passed an act specifically granting them jurisdiction, and that the Indian country statute, 18 U.S.C. § 1151 et. seq., grants criminal but not civil jurisdiction over allotted lands. The Indian country statute defines Indian country to include "all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same." 18 U.S.C. § 1151(c). Although the statute appears in Title 18, which deals primarily with crimes and criminal procedures, the Supreme Court has held that § 1151 applies to civil jurisdiction as well. *DeCoteau*, 420 U.S. at 427 n.2; *see also Pittsburg & Midway Coal Mining v. Watchman*, 52 F.3d 1531 n.10 (10th Cir. 1995) ("[T]he principle that § 1151 defines Indian country for both civil and criminal jurisdiction purposes is firmly established. Any suggestion to the contrary . . . is simply erroneous."). Thus, Mustang's argument that § 1151 does not apply to civil jurisdiction is incorrect, and the statute

supports our conclusion that the Tribes have jurisdiction over the allotted lands.

The language of the 1891 Act, which ratified verbatim the agreement between the Tribes and the United States, also supports our conclusion. Article II of the Act provides:

> *Subject to the allotment of land* in severalty to the individual members of the Cheyenne and Arapaho tribes of Indians, *as hereinafter provided for* and subject to the conditions hereinafter imposed, for the considerations hereinafter mentioned the said Cheyenne and Arapaho Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claims, title and interest, of every kind and character, in and to the lands [in the 1869 reservation].

26 Stat. 989, 1022 (emphasis added). The "subject to the allotment of land" clause modifies the cession language and expressly conditions the cession of some lands on the allotment of other lands. In addition, the "subject to the allotment of lands" provision implicitly *excludes* the allotted lands from the ceded lands. Therefore, the comprehensive terms of the cession do not apply to the allotted lands.

Article III of the Act describes the details of the allotment procedure:

> Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II hereof, *and in part consideration for the cession of lands named in the preceding article,* it is agreed by the United States that each member of the said

> Cheyenne and Arapaho tribes of Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held and owned in severalty. . . .

26 Stat. 989, 1023 (emphasis added). Mustang contends that because allotments were selected "out of the lands ceded," the allotted lands were ceded as well. This reading of the provision is incorrect. Article III merely describes who was entitled to allotments, identifies the land from which the allotments were to be selected, and describes the size of the allotments – it says nothing about which land is ceded, a subject covered in Articles I and II. Article I unconditionally cedes the land that was mistakenly reserved to the Tribes. Article II cedes the land in the 1869 reservation, but not unconditionally: the cession in Article II is *subject to allotment*. The plain language of the Act indicates that while the allotted lands were selected from the lands ceded, the allotted lands *themselves* were not ceded. Instead, the allotted lands were set aside for the use of the Indians, remaining part of Indian country even after the reservation was disestablished.

In conclusion, we hold that the allotted lands constitute Indian country over which the Tribes have civil jurisdiction. Thus, the Tribes have the power to enact and enforce a severance tax on oil and gas produced on allotted lands. Accordingly, the decision of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MUSTANG FUEL CORPORATION, et al., Plaintiffs, v. VIOLA HATCH, et al., Defendants.	)	No. CIV-88-1801-A
WARD PETROLEUM CORPORATION, Plaintiff, v. JUANITA LEARNED, et al., Defendants.	)	No. CIV-88-1954-A

JUDGMENT

(Filed Jul 6, 1995)

Pursuant to the Order issued on the 5th day of July, 1995, summary judgment is entered in favor of all defendants in these consolidated cases and against all plaintiffs. The defendants, as officials of the Cheyenne-Arapaho Tribes of Oklahoma, have authority to impose and collect the severance tax at issue on oil and gas produced from allotted lands held in trust by the United States for members of the Tribes.

Entered this 6th day of July, 1995.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States
District Court

ENTERED IN JUDGMENT DOCKET ON 7-7-95

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MUSTANG FUEL CORPORATION, et al., Plaintiffs, v. VIOLA HATCH, et al., Defendants.	)	No. CIV-88-1801-A
WARD PETROLEUM CORPORATION, Plaintiff, v. JUANITA LEARNED, et al., Defendants.	)	No. CIV-88-1954-A

ORDER

(Filed Jul 18, 1995)

The Court amends its order dated July 5, 1995. The first full paragraph on page fifteen should read as follows:

> Indeed, the only difference between this case and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), is that *Merrion* involved a severance tax on oil and gas produced from tribal trust lands within a reservation leased to non-Indians. While clearly the nature of the lands involved in a case may be crucial, the Court finds the Supreme Court's analysis instructive. There, the decision to uphold the tax did not

> hinge on the tribe's power to exclude non-Indians from the leased lands but its inherent power to govern those lands and to raise revenues to pay the costs of government. *Id.* at 137-44. The Court considered whether Congress had limited tribal sovereignty by enacting legislation that deprived the tribe of its power to impose the severance tax, and found no such legislation. *Id.* at 149-52.

The order is reissued nun [sic] pro tunc and is to read as follows:

Before the Court are cross-motions for summary judgment filed by all parties in these consolidated cases. The parties seek a ruling on the validity of a tax law enacted by the Cheyenne-Arapaho Tribes of Oklahoma (the "Tribes") in 1988 that imposes a severance tax on all oil and gas produced from lands within the Tribes' territorial jurisdiction. The principal issue is: what is that territorial jurisdiction?

Plaintiffs do not question the Tribes' power to levy the tax or to levy it on production from tribal lands, that is, lands held in trust for the Tribes by the United States. Plaintiffs claim, however, that the Tribes have exceeded the bounds of their powers by taxing production of oil and gas from allotted lands, that is, lands held in trust for individual members of the Tribes. In addition, Ward Petroleum Corporation, plaintiff in No. CIV-88-1954-A, asserts that the tax violates the Commerce Clause of the United States Constitution.

PROCEDURAL HISTORY

These cases were filed in 1988 by numerous oil companies and an individual who hold oil and gas leases or operate wells in drilling and spacing units that include allotted lands. The defendants are members of governmental bodies of the Tribes responsible for enacting and enforcing the tax law, the Business Committee and the Tax Commission. The United States appears as *amicus curiae* in support of the Tribes.

Both cases were stayed in 1989 to permit the plaintiffs to exhaust their tribal remedies. *See National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856-57 (1985). Plaintiffs first pursued administrative remedies before the Cheyenne-Arapaho Tax Commission and then sought declaratory and injunctive relief from the Cheyenne-Arapaho District Court. In January 1991, the district court granted summary judgment to the Tribes, and an appeal was taken to the Cheyenne-Arapaho Supreme Court. The supreme court affirmed the district court's decision in a published opinion filed January 3, 1994.

The cases before this Court were reopened in February 1994. Plaintiffs moved for summary judgment in October 1994 and defendants followed in November 1994. The parties reurge the same evidence and arguments that they presented to the tribal courts, except Ward, which raises its constitutional challenge only in this forum and relies on a new affidavit. The Court has denied a motion by defendants to exclude Ward's new claim and will decide the Commerce Clause claim on its merits.

UNDISPUTED FACTS

The relevant facts are primarily historical ones. The following recitation draws heavily from the Cheyenne-Arapaho Supreme Court's opinion. *See also Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980).

The Tribes were relocated to Oklahoma from their traditional homelands through two treaties with the United States. The first treaty in 1865 set aside a reservation in an area located partly in Kansas and partly in Oklahoma. When it was ratified, Congress required that the treaty be amended to locate the reservation solely in Oklahoma. Thus, a second treaty in 1867 defined a reservation located wholly in Oklahoma north of the Cimmarron River. The Tribes apparently misunderstood the location of their 1867 reservation and never occupied it; they located farther south. When the mistake was discovered, an executive order in 1869 conformed the boundaries of the Tribes' reservation to the territory they actually occupied. The allotted lands at issue here lie within the reservation specified in the 1869 executive order.

In 1887, a federal policy shift toward assimilation resulted in passage of the General Allotment (or Dawes) Act, 24 Stat. 388. *See* 25 U.S.C. §§ 331-58. This act authorized negotiations with tribes designed to terminate their reservations, to allot lands to individual tribal members, and to purchase the "surplus lands" for non-Indian settlement. In 1889, the Jerome Commission was created to conduct these negotiations, and in 1890, it negotiated an Allotment and Cession Agreement with the Cheyenne-

Arapaho. This Agreement was ratified by Act of March 3, 1891, 26 Stat. 989, 1022.

Through the Agreement, the Tribes ceded absolutely their interest in the reservation defined by the 1867 treaty (which they never inhabited). The Tribes ceded "[s]ubject to the allotment of land in severalty to the individual members of the Cheyenne and Arapaho tribes of Indians, as hereinafter provided for and subject to the conditions hereinafter imposed" their interest in the reservation defined by the 1869 executive order. The ensuing provisions of the Agreement gave all tribal members a right to select allotments "[o]ut of the lands" within the 1869 reservation. The statutory scheme under the Dawes Act was that allotments were to be held in trust by the United States for 25 years and then conveyed to the allottees or their heirs in fee simple. However, all allotted lands at issue here have been held in trust continuously and were never conveyed.

By 1892, all allotments required by the Agreement had been made and approved. On April 19, 1892, the remainder of the Tribes' 1869 reservation lands, except those claimed by other tribes and those reserved for certain uses under the Agreement, were opened to non-Indian settlement by presidential proclamation.

As is well known, the United States later reversed its assimilation policy. Beginning in 1930, statutes were enacted to reorganize tribal governments and regain communal land. Tribes located in Oklahoma were excluded from the Indian Reorganization Act of 1934, which specifically addressed tribes' governmental powers. *See* 25 U.S.C. §§ 461-79. However, Oklahoma tribes were

included under the Oklahoma Indian Welfare Act of 1936. *See* 25 U.S.C. §§ 501-09. Consequently, the Cheyenne-Arapaho Tribes have now reacquired lands within the boundaries of the 1869 reservation. These tribal lands are also held in trust by the United States and, as noted above, tribal taxing power as to tribal lands is not at issue in this case.

Before 1929, the Tribes had a government comprising traditional chiefs. In 1929, they adopted a written constitution and established an elected, representative form of government. Under the Oklahoma Indian Welfare Act, the Tribes adopted a new tribal constitution in 1937; that constitution was replaced with the current Cheyenne-Arapaho Constitution approved by the Secretary of the Interior in 1974. Thus, the Tribes have continuously maintained a tribal government and been federally-recognized.

In 1988, the Tribes enacted the General Revenue and Taxation Act, Ordinance No. 8118033. This act created a Tax Commission and, among other things, provided for the levy and collection of taxes in order to generate revenue for tribal services. *Id.* §§ 2, 101. Use of tax revenues was restricted to essential services, including police and fire protection, tribal courts, roads, water and waste disposal, education, public health, economic development, acquisition of land and administration of Indian property. *Id.* § 3. The new law created a tobacco tax (§§ 202-03), a sales tax (§ 302), a tribal entertainment tax (§ 502), and the oil and gas severance tax at issue.

A severance tax equal to 7.085% of the gross market value was levied on all petroleum, gas and other hydrocarbons "produced, severed, saved, and removed from any land within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma." *Id.*, §§ 401-02. The Tax Commission later promulgated rules defining that jurisdiction territorially to include all "Indian country" as defined by 18 U.S.C. § 1151 within the boundaries of the 1869 reservation. The incidence of the tax was imposed on mineral lessees and their successors, who are required to file reports and remit taxes monthly; these obligations can be assumed by unit operators and purchasers with the Tax Commission's approval. Specifically excluded from the tax law are "production attributable to the Indian trust royalty interest, not to exceed 20% of the gross value of such production, of all individually owned and tribally owned lands. . . . [P]ursuant to federal law and tribal constitution, no taxes shall be due or imposed on that portion of the production attributable to the Indian royalty interest." Ordinance No. 8118033, § 415.

DECISION OF THE CHEYENNE-ARAPAHO SUPREME COURT

As noted above, the Cheyenne-Arapaho Supreme Court affirmed the lower court's ruling that the Tribes' territorial jurisdiction encompasses all allotted lands. In so doing, the supreme court concluded that the contention on which plaintiffs base their challenge – that the 1890 Cession and Allotment Agreement disestablished the 1869 reservation – was immaterial. Rather, the Cheyenne-Arapaho Supreme Court applied a test formulated by the United States Supreme Court for determining

whether land is subject to tribal jurisdiction: "whether it has been 'validly set aside for the use of the Indians' and is subject to federal protection." Slip op. at 16 (quoting *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 511 (1991)). Under that test, the Cheyenne-Arapaho Supreme Court said, the allotted lands still held in trust for tribal members "are Indian country under 18 U.S.C. § 1151(c) and, as such, are validly set aside for the use of Indians under federal protection." *Id.* at 17.

The Cheyenne-Arapaho Supreme Court noted that its tribal government has continuously exercised authority over allotted lands and other lands within the boundaries of the 1869 reservation. According to the supreme court, nothing in the 1865 or 1867 treaties, the 1869 executive order or the 1890 Cession and Allotment Agreement, divested the Tribes of governmental authority. The 1890 Agreement changed the way title to the land was held, the supreme court reasoned, but did not divest the Tribes of governmental power or jurisdiction over its entire reservation, particularly lands that remained in federally protected status. Accordingly, the supreme court concluded that allotted lands still in trust are indistinguishable from other tribal lands for purposes of tribal jurisdiction, including the Tribes' inherent power to tax the activities of those who exercise the substantial privilege of doing business on and taking valuable resources from those lands.

STANDARD OF REVIEW

On the pivotal issue of whether the Tribes have jurisdiction over non-Indian oil and gas operations on allotted

lands, plaintiffs essentially seek relief from an adverse tribal court decision. Thus, a preliminary question is: what standard of review should be applied to the tribal court's ruling? Plaintiffs contend that this Court should defer to the tribal court's findings of fact but must review *de novo* its conclusions of law. Defendants argue that even legal conclusions of the Cheyenne-Arapaho Supreme Court should receive some deference. Defendants assert that tribal courts have special expertise in Indian law and are best suited to determine what was intended by treaties and agreements made by their tribal leaders. Lacking legal authority for this argument, however, defendants do not articulate a standard of review based on Indian law precedents but instead refer by analogy to cases involving decisions by federal administrative agencies.

The Court finds defendants' analogy to be inapposite here. The tribal court, unlike an administrative agency, is part of a tribal government with a vested interest in the outcome of this case; millions of tax dollars now lie in escrow pending entry of judgment. Moreover, while tribal courts undoubtedly have expertise in many matters, including application of tribal laws and precedents, the issue presented in this case requires examination of federal precedents and historical events involving the federal government as well as the Tribes. The Supreme Court has stated: "The question whether an Indian tribe retains the power to compel a non-Indian property owner to submit to the civil jurisdiction of a tribal court [and, presumably, a tax commission] is one that must be answered by reference to federal law and is a 'federal

question'. . . . " *National Farmers*, 471 U.S. at 857. Therefore, federal courts are equally capable to decide the jurisdictional issue presented as are tribal courts.

However, plaintiffs wrongly argue that the Cheyenne-Arapaho Supreme Court's opinion may be disregarded altogether. The tribal court's decision rests on important facts, namely, that the Tribes continuously had some form of government and that their government remained functional even when the Tribes briefly had no communally-owned land base. In view of these factual underpinnings, the Court finds the tribal court's ruling to be helpful in the disposition of this case.

DISCUSSION

I.

Disestablishment

Plaintiffs' primary contention is that the Tribes cannot tax non-Indian activities on allotted lands because the 1890 Cession and Allotment Agreement disestablished the Tribes' reservation and thus destroyed any territorial jurisdiction over which the Tribes could exercise authority. Once disestablished, plaintiffs say, the Tribes' power to govern allotted lands could only be restored by Congress, and no such restorative legislation has ever been enacted for the Cheyenne-Arapaho Tribes of Oklahoma.

Defendants, on the other hand, claim the Tribes have inherent authority to tax economic activities on all lands validly set aside for Indian use, including lands continuously held in trust for tribal members. Defendants contend that abolishment of tribal government cannot be

read into the 1890 Agreement because only a clearly expressed divestiture of tribal authority can affect a tribe's sovereignty and its inherent power to tax. Defendants forcefully argue that tribal jurisdiction remains undiminished by disestablishment of reservation boundaries because the remaining checkerboard of allotted lands provides a viable geographic base or "adequate fulcrum for tribal affairs". *DeCoteau v. District County Court*, 420 U.S. 425, 446 (1975).

There is ample case law concerning tribal jurisdiction to tax activities occurring within reservation boundaries and concerning state jurisdiction to tax Indian lands. There is sparse legal authority, however, concerning a tribe's power to tax non-Indian activities on allotted lands existing without a reservation. Plaintiffs resort to the principle that a tribe only has jurisdiction over nonmembers within its territory. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 141-42 (1982) ("[T]he limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction."). Plaintiffs also rely on *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206 (1943), to argue that disestablishment of a reservation divests a tribe of governmental power over allotted lands.

In *Oklahoma Gas & Elec.*, however, the Supreme Court was applying a statute that required the Secretary of Interior's permission before rights-of-way through public lands, parks and reservations could be used for electrical lines. *Id.* at 211-12. The Court decided that, when a reservation had been disestablished, the resulting allotted lands no longer could be considered a reservation, and the Secretary's approval was not required to erect power

lines running through those allotted lands. *Id.* at 215-16. Disestablishment was critical because the statute involved gave the Secretary of Interior approval or disapproval authority only over "reservations" and thus existence of a reservation was necessary.[1]

In contrast, disestablishment of a tribe's reservation has repeatedly been declared a "non-issue", as defendants say, in cases concerning state jurisdiction to tax tribal members. *See, e.g., Oklahoma Tax Comm'n v. Sac & Fox Nation,* 508 U.S. ___, 124 L. Ed. 2d 30, 40 (1993) (tribal members living and working on allotted lands are immune from state income and vehicle registration taxes). Plaintiffs assert that the Supreme Court's analysis in *Sac & Fox* is not controlling here, where a tribe's, rather than a state's, civil jurisdiction is at issue. The Court disagrees. The issue is analogous – whether one government can tax citizens of another government engaging in activities on allotted lands. Here, as in *Sac & Fox,* disestablishment of the tribal sovereign's reservation should not be dispositive. Rather, the proper test should be one by which jurisdictional disputes between Indians and non-Indians traditionally have been resolved.[2]

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[1] Plaintiff Ward relies on *Tooisgah v. United States,* 186 F.2d 93 (10th Cir. 1950), rather than *Oklahoma Gas & Elec.,* for its disestablishment argument. However, *Tooisgah* also involved jurisdiction under a statute containing the phrase, "within any Indian reservation". *See* 186 F.2d at 99; *United States v. Burnett,* 777 F.2d 593, 596 (10th Cir. 1985).

[2] Our court of appeals has explained the usefulness of the disestablishment analysis as follows:

> The State seems to believe that the Indian country status of the [land at issue] rests on whether exterior

In cases concerning tribal immunity from state taxes, the test consistently applied by the United States Supreme Court is whether the lands on which a state seeks to exercise jurisdiction over a tribe are lands validly set apart for Indian use under supervision of the federal government. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 511 (1991). Under this test, as discussed below, it is clear that the allotted lands in question are "Indian country". *See Sac & Fox*, 124 L. Ed. 2d at 40-41; 18 U.S.C. § 1151(c). In cases concerning the validity of a tribal tax, the test applied by the Supreme Court is whether the tribe has inherent power to tax the non-Indian activities in question. *See Merrion*, 455 U.S. at 140-41. Under this test, too, the Cheyenne Arapaho Tribes of Oklahoma clearly had authority to enact and enforce the severance tax at issue.

> boundaries of the 1866 Creek reservation have been disestablished. It does not. . . . The disestablishment question is primarily important for determining the status of *non-Indian* lands, which remain Indian country under 18 U.S.C. § 1151(a) until the surrounding portion of a reservation is disestablished. Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment. *See, e.g., Solem [v. Bartlett]*, 465 U.S. [463] at 467, n.8, *DeCouteau* [sic], 420 U.S. at 428.

Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967, 975 n.3 (10th Cir. 1987) (emphasis original).

II.

Indian Country

Plaintiffs do not, and indeed cannot on the facts presented, contest that the allotted lands involved have been validly set apart for Indian use. These allotted lands have continuously been held in trust by the United States for the benefit of tribal members. Rather, plaintiffs take issue with the Tribes' reliance on 18 U.S.C. § 1151(c), a criminal statute, to define the bounds of their civil jurisdiction. Plaintiffs also argue that the allotted lands are set apart for individual members of the Tribes, not the Tribes themselves, and thus the Tribes have no interest in those lands.

Section 1151's definition of "Indian country" has been frequently used by federal courts and Congress to define the parameters of tribal jurisdiction in both civil and criminal matters. *See, e.g., DeCoteau,* 420 U.S. at 427 n.2 (citing cases); *Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1540-41 (10th Cir. 1995) (citing cases); 25 U.S.C. § 1903(10). This Court is bound by the Tenth Circuit's recent holding in *Watchman*: "We hold § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes." 52 F.3d at 1541.

As to the argument that the Tribes have no interest in lands allotted to their members, plaintiffs provide no authority for this unique proposition, and the Court finds it wholly untenable. The Tribes' retention of trust allotments for tribal members when ceding reservation lands provided the Tribes a geographic base for exercise of their

governmental authority, if that authority has not otherwise been divested. *See Washington v. Confederated Tribes of Colville*, 447 U.S. 134, 152 (1980) ("The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status."). Indeed, it is undisputed that the Tribes have continuously maintained their governments, notwithstanding the cession a large part of their lands. The retained, allotted lands have never been opened to non-Indian settlement and have continuously remained in federally protected status. On these facts, the Court finds the Tribes unquestionably have taxing authority over these allotted lands.

III.

The Tribes' Taxing Power

Plaintiffs mistakenly frame the issue as whether the Tribes can tax non-Indians on allotted lands. What the Tribes are taxing is the removal of valuable mineral resources from lands dedicated to Indian use and owned beneficially by tribal members. The tax is levied on all mineral lessees who produce oil, gas or other petroleum products from allotted lands and other lands within the Tribes' jurisdiction. Production reduces the value of what is left for the Indian trust beneficiaries. The tax falls on non-Indians because they have entered into consensual agreements, namely, leases federally approved under the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-g, and have voluntarily undertaken oil and gas development on those

lands. "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana v. United States*, 450 U.S. 544, 565 (1980); *see South Dakota v. Bourland*, 508 U.S. ___, 124 L. Ed. 2d 606, 623 (1993); *Brendale v. Confederated Tribes & Bands of Yakima*, 492 U.S. 408, 428 (1989). This well-established exception to the general rule that a tribe's power does not extend to activities of nonmembers applies here.

Indeed, the only difference between this case and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), is that *Merrion* involved a severance tax on oil and gas produced from tribal trust lands within a reservation leased to non-Indians. While clearly the nature of the lands involved in a case may be crucial, the Court finds the Supreme Court's analysis instructive. There, the decision to uphold the tax did not hinge on the tribe's power to exclude non-Indians from the leased lands but its inherent power to govern those lands and to raise revenues to pay the costs of government. *Id.* at 137-44. The Court considered whether Congress had limited tribal sovereignty by enacting legislation that deprived the tribe of its power to impose the severance tax, and found no such legislation. *Id.* at 149-52.

Here, plaintiffs' argument that the Tribes have no power to tax non-Indians doing business on allotted lands disregards the Tribes' inherent power as dependent sovereigns. Plaintiffs argue that the Tribes ceded their governmental power as well as their property interest through the 1890 Cession and Allotment Agreement.

However, plaintiffs' argument goes too far. The Agreement, at most, talks about the Tribes surrendering their reservation; it is silent about the Tribes' governments. The Court has found no language in the 1890 Agreement or the 1891 ratifying Act that can reasonably be read to divest the Cheyenne-Arapaho Tribes of their sovereign power to tax economic activities within their territory. Nor do plaintiffs contend that Congress has expressed such an intention in any other federal legislation.[3]

Therefore, because the Cheyenne-Arapaho Tribes of Oklahoma are federally recognized tribes that have an inherent sovereign power to tax economic activities on their lands, and because the allotted lands are within their jurisdiction, the Tribes have the power to enact and enforce a severance tax on oil and gas production from allotted lands.

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[3] Moreover, even if a tribe's taxing power is dependent upon the tribe's power to exclude non-Indians from the lands at issue, the Cheyenne-Arapaho Tribes of Oklahoma have that power over the allotted lands. The 1865 and 1867 treaties, as amended by the 1869 executive order, established the Tribes' reservation as an area where white men would be excluded. By the Agreement, the Tribes gave up their right to exclude white men from part of that area and allowed that part to be opened to non-Indian settlement. However, the allotted lands were not opened to the public by the 1892 proclamation; they were specifically excepted. Non-Indians have continuously been excluded from ownership of the allotted lands, and those lands have continuously maintained their federally protected status.

IV.

Constitutionality of the Tax

Even if the Tribes have the power to impose the severance tax, Ward claims that the tax scheme adopted by the Tribes violates the Interstate Commerce Clause of the United States Constitution. Ward complains that the tax (1) discriminates between non-Indian mineral lessees and Indian royalty owners and (2) unfairly requires non-members of the Tribes to pay for services that benefit only members. Neither contention has constitutional merit.[4]

First, as to the alleged unfairness of taxing only lessees and not royalty interest owners, the Commerce Clause prohibits discriminatory preference for local commerce. It "looks not to ethnicity – Indian against non-Indian – but to competitive advantage". *Kerr-McGee Corp. v. Navajo Tribe*, 731 F.2d 597, 602 (9th Cir. 1984), *aff'd*, 471 U.S. 195 (1985). The ordinance at issue taxes all oil and gas produced from lands within the Tribes' jurisdiction at the point of severance. The ordinance makes no exception

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[4] Ward also contends in a cursory fashion that the severance tax unduly burdens oil and gas production from allotted lands. Ward presents no factual or legal support for this argument. Presumably, Ward refers to the possibility that the same activity may be subject to multiple taxation by both the Tribes and the State of Oklahoma. However, because the activity taxed occurs entirely within the Tribes' jurisdiction, "any challenge asserting that tribal and state taxes create a multiple burden on interstate commerce should be directed at the state tax, which, in the absence of congressional ratification, might be invalidated under the Commerce Clause." *Merrion*, 455 U.S. at 158 n.26; *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 187-91 (1989).

for oil and gas consumed on allotted lands or consumed by tribal members. *See Merrion*, 455 U.S. at 157-58; *Kerr-McGee*, 731 F.2d at 602. The exemption for royalty interests merely means that "the Tribes do not have to go through the paces of taxing themselves, and that the royalty interests of individual members should remain exempt as direct income from trust lands." *Conoco, Inc. v. Shoshone & Arapaho Tribes*, 569 F. Supp. 801, 808 (D. Wyo. 1983); *see Merrion*, 455 U.S. at 158.

Second, as to whether plaintiffs benefit from any tribal services, Ward's argument ignores the record. The Tribe currently provides services to all people within its jurisdiction, tribal members and non-members alike, including law enforcement protection, ambulance and emergency medical services, and a judicial system. In fact, plaintiffs have just consumed, among other things, almost five-years' worth of the Tribes' judicial resources. There is no requirement, as Ward argues, that the tax must be used to fund services related to production of oil and gas in order to be constitutional. *See Conoco*, 569 F. Supp. at 808 (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981)); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 190 (1989).

In short, Ward's Commerce Clause challenge has no support in the undisputed facts or the law.

CONCLUSION

Although the Court has not deferred to the Cheyenne-Arapaho Supreme Court's opinion, the result reached by the tribal courts was right. The Cheyenne-Arapaho Tribes of Oklahoma were not divested of their

inherent authority to tax economic activities of non-tribal members on allotted lands by the cession of reservation lands in 1890. The allotted lands were validly set apart for use of the Tribes' members at that time and have continually been in federally protected status. Therefore, the Tribes can validly impose a tax on the valuable oil and gas development taking place on those lands as a source of revenue to fund tribal services within their territory. The Tribes should not be foreclosed from using land held in trust for tribal members to raise money to pay for governmental services. The manner in which the Tribes have imposed that tax does not implicate Interstate Commerce Clause concerns.

The Court is mindful, however, that its decision is limited to the facts of the case before it. The allotted lands at issue are trust lands. While allotted to tribal members, these lands have never been conveyed in fee simple but have continuously been held in trust by the United States. The Court leaves for another day the issue of whether different allotted lands, such as ones conveyed in fee to individual Indians with restrictions on alienation, would similarly remain within the taxing jurisdiction of the tribe to which the individuals belong.

For the above reasons, the summary judgment motions of the numerous plaintiffs in Case No. CIV-88-1801-A and plaintiff Ward Petroleum Corporation in Case No. CIV-88-1954-A are both DENIED. The defendants' motion for summary judgment in both cases is GRANTED.

It is so ordered this 18 day of July, 1995.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States
District Judge

In the Supreme Court
of the Cheyenne & Arapaho Tribes

MUSTANG FUEL CORPORATION, et al.,	)	***PUBLISH***
Plaintiffs/Appellants,	)	*No. CNA-SC-91-02*
v.	)	
CHEYENNE-ARAPAHO TAX COMMISSION, et al.,	)	
Defendants/Appellees.	)	

APPEAL FROM JUDGMENT OF THE DISTRICT COURT FOR CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA,
the Honorable George Tah-Bone, Jr., Chief District Judge. AFFIRMED.

(Filed Jan. 3, 1994)

STANLEY L. CUNNINGHAM
STEVEN W. BUGG — Attorneys for Plaintiffs/Appellants, Mustang Fuel Corporation, et al.

MICHAEL E. SMITH — Attorneys for Plaintiff/Appellant, Ward Petroleum Corporation

MELODY McCOY — Attorney for Defendants-Appellees, Cheyenne-Arapaho Tax Commission, et al.

BEFORE: Arvo Q. Mikkanen, Chief Justice, Charles G. Tate, Associate District Judge, sitting by designation, and Steven L. Tolson, Special Associate Justice.

OPINION

MIKKANEN, Chief Justice.

This case involves a challenge to the authority of the Cheyenne-Arapaho Tribes of Oklahoma ("Tribe" or "Tribes" or "Cheyenne-Arapaho") to impose a severance tax on oil and gas development activities on allotted Indian lands held in trust for Cheyenne and Arapaho tribal members. In 1988, the Cheyenne-Arapaho adopted an oil and gas severance tax on all petroleum produced from any land "within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma." General Revenue and Taxation Act of 1988, § 401. The Cheyenne-Arapaho Tax Commission ("Tax Commission"), the tribal body charged with the enforcement of the severance tax, has defined the territorial jurisdiction of the Cheyenne-Arapaho to include all "Indian country" as defined in 18 U.S.C. § 1151 within the boundaries of the original 1869 Cheyenne-Arapaho Reservation. Rules of the Cheyenne-Arapaho Tax Commission, Rule 1.1.11.

The appellants, or plaintiffs below, include nineteen oil companies (referred to collectively as "Mustang"), who are the lessees of oil and gas leases covering lands allotted to the members of the Cheyenne Arapaho which are held in trust by the United States of America (the "Allotted Lands"). The Tax Commission has sought to impose a severance tax against Mustang with respect to leases on the Allotted Lands. Mustang brought this action challenging the civil jurisdiction of the Cheyenne-Arapaho to impose the severance tax on the oil companies who have numerous leases on the Allotted Lands. Mustang has not challenged the authority of the Cheyenne-

Arapaho to impose the severance tax on unallotted tribal lands.

In the Cheyenne-Arapaho District Court ("District Court") both the plaintiffs and defendants moved for summary judgment. The District Court, the Honorable George Tah-Bone, Jr., Chief Judge, granted summary judgment in favor of the Tribes and denied summary judgment to Mustang, holding that the Cheyenne-Arapaho Tribes do have civil jurisdiction to impose severance taxes on the non-tribal members with respect to the Allotted Lands. Cross-appeals to this court followed the District Court's ruling. The parties thoroughly briefed the issues and oral argument was held before this court. For the reasons explained below, we affirm the District Court's decision and hold that the Cheyenne-Arapaho Tribes properly may impose taxes on persons within Indian country, which includes the Allotted Lands validly set aside for use of Cheyenne-Arapaho Indians.

BACKGROUND

A. The Parties and Status of the Allotted Lands.

The Appellees, or defendants below, include governmental agencies of the Cheyenne-Arapaho Tribes of Oklahoma and individual members of those agencies.[1] The

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[1] Cheyenne-Arapaho Tax Commission
Cheyenne-Arapaho Business Committee
Juanita Learned
Alton Harrison
Edgar Heap of Birds
Viola Hatch

Cheyenne-Arapaho Tribes are federally-recognized and are organized under a constitution adopted pursuant to the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. §§ 501-509, and approved by the Secretary of the Interior of the United States in 1974.

The Tribes are located in what is now Oklahoma as a result of two treaties with the United States signed in 1865 and 1867. Treaty of Oct. 14, 1865, 14 Stat. 703; Treaty of Oct. 28, 1867, 15 Stat. 593. The treaties were executed as part of the federal government's "removal" policy whereby many Indian tribes were relocated from their traditional homelands to "Indian Territory," which is present-day Oklahoma. *See generally,* F. Cohen, *Handbook of Federal Indian Law* 770-75 (1982 ed.). Pursuant to the 1865 Treaty, a Presidential Executive Order of August 10, 1869 established the boundaries of the Tribes' 1869 Reservation ("1869 Reservation"). *See,* 1 Kappler, *Indian Affairs, Laws, and Treaties,* p. 839-41; *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma,* 618 F.2d 665, 666 (10th Cir. 1980).

In 1890, the Tribes were induced to enter into an Allotment and Cession Agreement with the United States ("Allotment Agreement" or "Agreement"). The Allotment Agreement was ratified by the Act of March 3, 1891, 26 Stat. 989, 1022 ("Allotment Act" or "Act"). It is significant to note that neither the Allotment Agreement nor the Allotment Act specifically addressed the question of

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Floyd Blackbear
Jonathan Burgess
Christine George
Kris Littleraven
Marlin Hawk

tribal governmental powers or jurisdiction over lands. Rather, the Agreement and the Act contemplated a change in the nature of the land from common tribal ownership to individual Indian ownership. The Act clarified the boundaries of the 1869 Reservation, and by its terms the Cheyenne-Arapaho ceded to the United States certain claims to lands outside those boundaries. *Id.* at art. I. Certain lands inside the 1869 Reservation boundaries were allotted to individual tribal members and were to be held in trust for them by the federal government for a period of time, after which it was contemplated they would be granted in fee to the Indian owner and removed from trust status. *Id.* at arts. II and III. Subject to such retained allotments held by individual tribal members, the Tribes were forced to cede all of the remaining so-called "surplus land" in the 1869 Reservation to the United States. Ultimately these ceded lands were settled by non-Indian homesteaders.

The allotment policy was applied to individual tribes through various treaties or congressional acts, and was implemented across the United States in a broad fashion to numerous tribes with the passage of the General Allotment Act, 24 Stat. 388, as amended, 25 U.S.C. §§ 331-58. The allotment policy was primarily aimed at forcibly assimilating Indians into American society by individualizing common tribal land holdings into parcels of varying sizes called allotments, to be used for farming and agricultural purposes. The parcels were to be held in trust by the federal government for the allottees, typically for 25 years, after which time they would be conveyed in fee simple to the individual Indian owners. Federal policy eventually changed in the 1930s and allotment was

stopped due to the detrimental effects upon the Indians and tribes who were subjected to the policy and due to the significant losses of Indian lands. After the passage of the Indian Reorganization Act, 48 Stat. 984, 25 U.S.C. § 461, *et seq.*, and the Oklahoma Indian Welfare Act, 49 Stat. 1967, 25 U.S.C. § 501, *et seq.*, further individualization of tribal land ceased and the remaining allotments that had not yet gone out of trust were continued in a protected federal trust status. Many of the allotted lands are still held in trust due to the extension of the original trust periods. Other later acquired individually owned allotments as well as tribal lands have been placed into trust since the 1890's. All of the allotted lands involved in this case are still held in trust.

After the removal to Indian Territory and the allotment of the reservations, many tribes, including the Cheyenne-Arapaho, continued to exercise rights of self-government and inherent powers of tribal sovereignty over their remaining lands. Before 1929, the Cheyenne-Arapaho Tribal government was comprised of traditional chiefs. In 1929, the Tribes adopted a written constitution establishing an elected representative form of government. A new tribal constitution was adopted in 1937 under the Oklahoma Indian Welfare Act, which was replaced in 1974 with the current Cheyenne-Arapaho Constitution, that was also adopted under the provisions of the Oklahoma Indian Welfare Act.

The appellants in this action include nineteen oil companies,[2] who have leases with members of the Cheyenne-Arapaho Tribes, and conduct oil and gas development operations on the Allotted Lands. The leases are federally-approved as required by the Indian Mineral Leasing Act, 25 U.S.C. § 396.

According to the records of the Tribal Tax Commission, since August, 1988, Mustang has operated under 229 leases on allotted lands. Since that same time, under its lease, Mustang has had about 15,744 acres of allotted lands under production according to the information included in the brief of the Tribes.[3]

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[2] Mustang Fuel Corporation
Amoco Production Company
Anson Corporation
Apache Corporation
Conoco, Inc.
Phillips Petroleum Company
Oryx Energy Company as managing partner of Sun Operating Limited Partnership
Mesa Mid-Continent Limited Partnership
Texaco, Inc.
Texaco Producing Company
Union Oil Company of California d/b/a UNOCAL
NGC Energy Company
Bogert Oil Company
Kaiser-Francis Oil Company
Seneca Oil Company
Unit Drilling and Exploration Company
Viersen and Cochran
Bracken Energy Company
Ward Petroleum Company

[3] The Tribes' Brief indicated that in addition to Mustang, forty-four (44) other oil companies that are not parties to this litigation have operated since August, 1988 on allotted lands

B. The Tax Act.

In April, 1988, the Tribes enacted the Cheyenne-Arapaho Tribes of Oklahoma General Revenue and Taxation Act of 1988, Ordinance No. 8118003, Resolution No. 042788S89 (Apr. 27, 1988) (hereinafter "the Tax Act").[4]

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under leases with tribal members. These other oil companies have operated under 182 leases on about 11,696 acres of allotted lands. There are eleven leases which are operated by both one of the Mustang companies and a non-party oil company. Thus, the total of sixty-two (62) oil companies operate under a total of 400 leases on a total of about 27,440 acres of allotted lands of Cheyenne-Arapaho tribal members.

[4] The purpose of the Tax Act is stated as follows:

> It being necessary to strengthen the tribal government of the Cheyenne-Arapaho Tribes by licensing and regulating certain conduct within the tribal jurisdiction, to provide financing for expenses of the tribal government, and to provide financing for expansion of tribal government operations and services in order for the Cheyenne-Arapaho Tribes to efficiently and effectively exercise its confirmed governmental responsibilities within the Indian Country subject to the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma, the purpose of this title is to provide simple, fair, straight forward and efficient procedures, provide for the licensing and regulation of certain conduct, and the levy and collection of certain revenue and taxes.

C.A.G.R.T.A. § 2. Tax revenues are to be used for essential governmental services as follows:

> All tax revenues shall be appropriated to provide essential tribal government services, including, but not limited to:
>
> (1) Police and fire protection;
> (2) Establishment of tribal courts;

The Tax Act imposes a tax on, among other things, oil and gas "produced, severed, saved, and removed from any land within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma." C.A.G.R.T.A. §§ 401 & 402. The amount of the tax is "7.085% of the gross market value." *Id.* The taxes are due at the time of production, severance, saving, or removal. *Id.* at § 403.[5] Due to increased

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(3) Road construction, repair, and maintenance;
(4) Water, sewage, and garbage disposal;
(5) Education of children;
(6) Public health;
(7) Industrial assistance and advancement and development of tribal enterprises to address chronic unemployment and chronic poverty among tribal members;
(8) Public recreation;
(9) Acquisition of land and general administration of Indian property; and
(10) Other essential tribal services.

C.A.G.R.T.A. § 3(a).

[5] The Tax Act provides due process and a number of procedural safeguards for taxpayers. Taxpayers may pay under protest and protest money is to be kept in a separate account pending final determination of the protest. C.A.G.R.T.A. § 118. There are also provisions for administrative appeals to the Tribal Tax Commission. *Id.* at §§ 151 & 152. Upon exhaustion of administrative remedies, a taxpayer may bring an action in tribal court to enjoin the Tax Commission from collecting any taxes, penalties, or interest assessed, or for the recovery of any taxes, penalties, or interest paid under protest or wrongfully assessed or collected. *Id.* at §§ 153, 154, & 155. The immunity of the Tax Commission in such actions is expressly waived. *Id.* at § 154. There are also several provisions governing refunds to taxpayers. *Id.* at §§ 155, 156, 161, & 162.

expenses in operating governmental programs, many tribes have turned to the use of their inherent power to tax as a means to generate revenue. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 137 (1982) (an Indian tribe's "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self government and territorial management"). The Cheyenne-Arapaho, lacking substantial financial resources, turned to taxation as a means of providing revenue for the operation of day to day governmental services for Indians and non-Indians in the area.

C. Procedural History.

In October, 1988, Mustang filed suit in the U.S. District Court for the Western District of Oklahoma, in Oklahoma City, Oklahoma, challenging the Tribes' authority to impose a tax on its activities with respect to the Allotted Lands. The Tribes moved to stay or dismiss the federal action, on the grounds that Mustang had failed to exhaust its tribal remedies by litigating the matter in the tribal court system.

By subsequent agreement between the parties, the federal action was stayed pending exhaustion of tribal remedies. Mustang agreed, for the duration of the lawsuit, to pay its taxes timely into escrow with the federal court, to provide defendants with copies verifying the payments made, and to file timely with the Tax Commission the tax reports required by the Tax Act. As of June 19, 1991, Mustang has paid $2,236,800.24 into the escrow account.

In March, 1989, Mustang filed administrative appeals with the Tax Commission, again challenging the Tribes' authority to tax its activities on allotted lands. Following briefing by the parties, the Tax Commission ruled in June, 1989 that, as an administrative agency, it lacked jurisdiction to determine the validity of the Tax Act that it was charged with enforcing. *Mustang Production Co., et al. v. Combs,* Tax Director, No. 89-005 (Cheyenne-Arapaho Tax Comm'n, June 14, 1989).

In July, 1989, Mustang filed a complaint in the Cheyenne-Arapaho District Court, under the Tax Act § 154, and various sections of the Cheyenne-Arapaho Law and Order Code. The complaint sought, in part, a declaratory judgment that the Tax Act was "unconstitutional, invalid, null and void and may not be applied or enforced against plaintiffs or plaintiffs' property with respect to the Allotted lands." The Tribes answered, praying that the court find the Tax Act valid as applied to Mustang with respect to the Allotted Lands.

The Tribes then moved to strike Mustang's complaint to the extent it alleged that tribal jurisdiction to tax activity on the Allotted Lands depended upon whether the reservation boundaries had been disestablished. The Tribes argued that, as a matter of law, disestablishment of the boundaries of the Cheyenne-Arapaho Reservation was irrelevant to the issue of tribal jurisdiction over allotted lands. The appellees argued that to the extent Mustang was arguing that disestablishment of reservation boundaries affected its taxing power over allotted lands, those portions of the complaint should be stricken.

The Tribes moved for summary judgment on March 16, 1990, arguing that the Tribes were entitled to judgment as a matter of law. On August 17, 1990, Mustang filed its cross-motion for summary judgment and it responded to the Tribes' summary judgment motion. In support of its cross-motion for summary judgment, Mustang submitted an affidavit of an expert witness, Donald E. Green. Along with its brief in response to Mustang's cross-motion for summary judgment, the Tribes submitted the affidavit of Donald J. Berthrong as an expert witness in response to Mustang's summary judgment theories to counter the affidavit of Donald Green. Mustang opposed the use of Dr. Berthrong's affidavit.

Oral argument was held in November, 1990 on the summary judgment motions, and on all other matters pending before the court. At the oral argument, the District Court denied the use of Dr. Berthrong's affidavit by the Tribes in response to Mustang's cross-motion for summary judgment because Berthrong was not on the defendants' approved witness list.

On December 20, 1990, the trial court issued an order granting the Tribes' motion for summary judgment and denying Mustang's cross-motion. The order was followed by a formal written opinion on January 31, 1991, *reprinted in* the Indian Law Reporter, 18 Indian L. Rep. 6095, (Chey.-Arap. Dist. Ct., Jan. 31, 1991). In its written opinion, the Cheyenne-Arapaho District Court concluded that the Allotted Lands "are now, and always have been a part of the Cheyenne and Arapaho Indian reservation," that the allotted lands are "Indian Country as the term is defined by federal law," and that the allotted lands are "subject to taxation by the tribal government." *Mustang,*

et al. v. Cheyenne-Arapaho Tax Commission, Slip Op. at 11-12, No. CNA-CIV-89-7 (Chey. Arap. Dist. Ct., January 31, 1991), 18 Indian L. Rep. 6095. The court did not rule on the several other pending motions.[6]

D. Status of Case on Appeal.

1. The motions for summary judgment.

To grant summary judgment under tribal law, the District Court must find that there were no genuine issues of material fact in dispute and that a party was entitled to judgment as a matter of law. Cheyenne-Arapaho Civil Procedure Code § 905(c). In support of its motion for summary judgment, the Tribes submitted the following Statement of Undisputed Material Facts:

> 1. The Tribe is organized under a constitution adopted under the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§ 501-509. That constitution was approved by the Secretary of the Interior on April 3, 1974, and ratified by the Tribe on April 19, 1975.
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> 2. The boundaries of the Tribe's reservation were established by the Executive Order of August 10, 1869. The boundaries were clarified in the Allotment and Cession Agreement of 1890, as ratified by the Act of Mar. 3, 1891, 26

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[6] The following motions or matters were pending before the court: (1) the Tribes' motion to strike portions of Mustang's complaint; (2) the Tribes' motion to dismiss the Business Committee; and (3) the Tribes' argument that the affidavit of Donald Green should be disregarded.

Stat. 989, 1022. The Agreement in part authorized the allotment of certain lands with (sic) the boundaries of the reservation into allotments held in trust for individual tribal members.

3. On April 27, 1988, the Tribe adopted a resolution enacting an ordinance establishing in part a tax on oil and natural gas produced, severed, saved, and removed from allotted lands held in trust for tribal members.

4. Throughout all trust lands, tribal and allotted, within the exterior boundaries of its reservation as described in paragraph 2, the Tribe provides the following services to all people, members and nonmembers:

a. law enforcement protection;
b. ambulance and emergency medical services; and
c. a judicial system.

5. The plaintiff oil companies entered into federally-approved leases with members of the Tribe under which they engage in the production, severance, saving, and removal of oil and gas from allotments within the boundaries described in paragraph 2 herein.

In addition, in its Brief in Response to Mustang's cross-motion for summary judgment, the Tribes added the following undisputed material fact:

6. Since allotment, the allotted lands have been held in trust by the United States for members of the Tribe continuously.

In support of its cross-motion for summary judgment, Mustang also submitted a "Statement of Facts" and apparently disputed two of the Tribes' material facts.

Mustang indicated that the Tribes were alleging that the 1869 Reservation boundaries continued to be in existence. The Tribes subsequently responded that the Tribes were not alleging or relying on the existence of the boundaries as a material fact in this case. Because of the conclusions of this court set forth below, the existence or non-existence of the Cheyenne-Arapaho Reservation boundaries does not alter the result reached in this case. Disestablishment of the boundaries or diminishment of the reservation is not dispositive of the issue of tribal taxing jurisdiction over the allotted lands that remain in trust status and are Indian country under 18 U.S.C. § 1151(c). Although this fact was perhaps disputed by the parties, we conclude that, this issue is not a *material* fact that could have affected the outcome of this case. Accordingly, any dispute concerning this issue is not properly a basis to reverse the District Court's ruling.

The District Court's decision did not expressly set forth the undisputed material facts which formed the basis of its summary judgment ruling. Nevertheless, since the District Court did grant the Tribes' summary judgment motion, it is implicit in that ruling that the court adopted the statement of material facts presented in the original motion.

2. The Tribes' Use of the Affidavit of Donald J. Berthrong.

The Tribes have specifically cross-appealed the exclusion by the District Court of Donald J. Berthrong's affidavit in construing the summary judgment motions. We conclude that the trial court incorrectly excluded the

Berthrong affidavit presented in response to a motion for summary judgment. Under the provisions of Section 905(e) of the Cheyenne-Arapaho Civil Procedure Code, it is implicit that a party may present opposing affidavits in response to a motion for summary judgment. The Cheyenne-Arapaho summary judgment proceedings are similar to the Federal Rules of Civil Procedure, and although federal court rulings and Rule 56 of the Federal Rules of Civil Procedure are not binding on the tribal courts we may look to federal precedents for guidance. Our review of federal cases indicates that parties are generally free to, and may be required to, submit opposing affidavits to effectively respond to a motion for summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-34 (1986).

It is not generally required that such affiants be listed on witness lists before a party may submit their affidavits to demonstrate the existence or lack of disputed material issues of fact. Accordingly, the trial court's exclusion of the Berthrong affidavit from consideration in connection with the summary judgment proceedings because Berthrong was not listed on the witness list, was error. However, we further conclude that the Berthrong affidavit primarily addressed the question of reservation disestablishment, which is in any event irrelevant to the issue of tribal jurisdiction over the Allotted Lands. For the same reason, we have not relied on the evidence contained in the affidavit of Donald Green. In both instances, the trial court should have permitted the parties to rely on admissible relevant information in such affidavits. However, as we have stated, the existence or non-existence of the 1869 Reservation boundaries would not alter the outcome of this case.

3. The Dismissal of the Business Committee.

One named defendant in this action is the "Cheyenne-Arapaho Business Committee." In the District Court, the Tribe moved to dismiss the Business Committee as an entity on the grounds of sovereign immunity. In response, Mustang essentially conceded that the Business Committee should be dismissed. No proven allegations that the Business Committee members acted *ultra vires* are contained in the record.

Although the Tribe did not cross-appeal the issue of the Business Committee's dismissal, sovereign immunity is a jurisdictional issue which may be reached by the appellate court *sua sponte*. *See, e.g., Rosenfeld v. United States*, 859 F.2d 717 (9th Cir. 1988); *Koerpel v. Heckler*, 797 F.2d 858, 861 (10th Cir. 1986). Since the Cheyenne-Arapaho Tribes and its tribal agencies or political subdivisions possess sovereign immunity unless such immunity is specifically and explicitly waived, the Business Committee should be, and hereby is, dismissed. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 172-73 (1977); *Enterprise Management Consultants, Inc. v. United States*, 883 F.2d 890, 892 (10th Cir. 1989); *Chemeheuvi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047 (9th Cir. 1985), *rev'd per curium on other grounds*, 474 U.S. 9.

DISCUSSION

The primary issue before this court concerns the fundamental question of tribal jurisdiction over allotted Indian lands. This question is particularly important for a

tribal forum to decide given the unique role of tribal courts in determining issues of tribal jurisdiction. *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985); *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987). The Cheyenne-Arapaho Tribal Code addresses the definition of lands over which the Tribes exercise governmental authority. For example, the Cheyenne-Arapaho Tribal Code states:

> (t)he Territorial Jurisdiction of the Courts shall extend to all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code over which the Tribes have authority, *including* tribal or *individual, trust,* non-trust and restricted *land,* and including all land owned by tribal agencies in their own name, all waters, minerals and wildlife, and any other such land, or interest in land, which may be subsequently acquired by virtue of Executive Order, a declaration or regulation of the United States Department of Interior, a declaration or order of a Court of competent jurisdiction, by purchase, gift, relinquishment, or by any other lawful means

(Emphasis added). Additionally, the specific tribal statute governing the extent of tribal taxing jurisdiction indicates that the sovereign authority of the Tribes to tax extends to all lands within the Tribes' jurisdiction which are defined as Indian country under 18 U.S.C. § 1151.

The basic test for determining whether land is subject to tribal jurisdiction is whether it has been "validly set aside for the use of the Indians" and is subject to federal protection. *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 511 (1991). Here, for the

reasons set forth below, we find that the District Court properly determined that the Cheyenne-Arapaho Tribes have the authority to impose severance taxes concerning allotted lands still held in trust by tribal members, because those lands are Indian country under 18 U.S.C. § 1151(c) and, as such, are validly set aside for the use of Indians under federal protection.

Without deciding the question of whether the 1869 Reservation boundaries were disestablished or whether allotment resulted in a diminished reservation, which are issues that are not properly before us for decision today, it is clear that the Tribes retain jurisdiction over the trust allotments regardless of the status of the original reservation boundaries. Nothing in the Treaty of October 14, 1865, the Treaty of October 28, 1867, the Executive Order dated August 10, 1869, the Allotment Agreement, or the Allotment Act specifically divested the Tribes of governmental authority.[7] The judicial, legislative, and executive branches of the Cheyenne-Arapaho Tribes have continuously, and currently do, exercise authority over all allotted lands held in trust status throughout the original reservation area. The tribes also exercise jurisdiction over dependent Indian communities under 18 U.S.C. § 1151(b) and over trust tribal lands, including those which have

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[7] We agree with the District Court that canons of construction require that treaties or agreements and doubtful expressions contained in treaties or agreements are to be resolved in the favor of the Indians. *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Tulee v. Washington*, 315 U.S. 681, 684-85 (1942); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). In this case, such canons further support the holding of the District Court that jurisdictional authority was not divested from the Tribes.

been judicially determined to be "reservation" lands under 18 U.S.C. § 1151(a), *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980).

Under the specific act of Congress which effectuated the allotment of the Cheyenne-Arapaho Tribes' reservation, it is clear that its provisions were concerned with the changing of the status of the lands from tribal common ownership to individual ownership. We conclude that rather than divesting the Tribes of jurisdiction over its entire reservation, as Mustang suggests, the Allotment Act transferred the *title* to the lands to the United States, *subject to* the retained allotments held by individual Indians which have remained in a protected trust status from the 1890s to today. In fact, Article II of the Allotment Agreement states that, with respect to the 1869 Reservation, and *"subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapaho Tribes of Indians, . . .* the said Cheyenne and Arapaho Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely without any reservation whatsoever, express or implied, all of their claim, title and interest, of every kind and character . . . " to the lands within the 1869 Reservation (emphasis added). Thus, conveyance of property to the United States was subject to individual tribal members retention of allotments.

Mustang has argued that the "subject to" language should be read differently and that the Allotment Act divested the Cheyenne-Arapaho Tribes of jurisdiction over all of the allotted and tribal lands remaining in the reservation area because the Tribes ceded all reservation lands to the United States. Then, Mustang argues that the 1948 codification of the "Indian Country" statute re-

authorized and "granted" tribal jurisdiction to the Tribes, but *only* over the tribal and not the allotted lands.[8] This argument conflicts with the language in Article II of the Allotment Agreement. In addition, this argument is not supported by or consistent with established precedents and the majority of courts have not construed 18 U.S.C. § 1151 in such a manner. In short, Mustang's argument on this point is without merit and is at odds with numerous rulings of the U.S. Supreme Court.

The United States Supreme Court has repeatedly held that Indian land remains subject to tribal jurisdiction when it is designated for the use of the Indians under the superintendence of the Government. *Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission*, 498 U.S. at 511. In *Citizen Band Potawatomi*, the state argued that land in Oklahoma held in trust for a tribe was subject to state jurisdiction because it was not within clearly established reservation boundaries. The Supreme Court rejected that argument and held:

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[8] 18 U.S.C. § 1151, states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights of way through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

> In *United States v. John*, 437 U.S. 634 [] (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' . . . Here . . . the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in John, we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes.

Citizen Band Potawatomi, 498 U.S. at 511 (some citations omitted). Contrary to Mustang's assertions, Indian trust allotments classified as Indian country under 18 U.S.C. § 1151, remain under tribal and federal jurisdiction as opposed to state jurisdiction regardless of whether they are located within reservation boundaries.[9] Absent clear and unmistakable language divesting jurisdiction, which is wholly absent in this case, an Indian tribe retains jurisdiction over allotted trust lands characterized as Indian country. The Allotment Act did not diminish or even specifically address the governmental authority of

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[9] The General Allotment Act, as amended and interpreted in numerous federal and tribal court decisions, contemplated that allotments would not come under the jurisdictional authority of a state until patents in fee were issued, and the land was removed from trust status. *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978). Only after removal from trust status would such lands be excluded from the jurisdictional authority of the tribal and federal government, and become subject to state authority.

the Tribes. Disestablishment of the reservation boundaries is a moot and irrelevant issue in determining jurisdiction over the trust allotments.

Most recently, in *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. ___, the United States Supreme Court again held that allotted lands in Oklahoma continue to maintain their character as Indian country, regardless of the existence or non-existence of reservation boundaries. The court maintained and reiterated that the test to determine tribal and federal jurisdiction is whether such lands are validly set apart for the use of the Indians. Indian allotments in Oklahoma and elsewhere have long continued to maintain their status as lands subject to tribal jurisdiction, even where reservation lines were dissolved or disestablished.

The principle that Indian lands, once set aside, retain their unique character as lands subject to federal and tribal jurisdiction, has long been established and consistently followed by the courts. *See, e.g., Mattz v. Arnett*, 412 U.S. 481 (1973) (undisposed-of ceded land restored to tribal ownership); *United States v. McGowan*, 302 U.S. 535 (1938) (lands purchased out of federal funds and occupied by tribe); *United States v. Sandoval*, 231 U.S. 28 (1913) (lands of Pueblo tribes held in fee); *Donnelly v. United States*, 228 U.S. 243 (1913) (executive order tribal lands); *Bates v. Clark*, 95 U.S. 204 (1877) (lands in original Indian title); and *see generally* F. Cohen, *Handbook on Federal Indian Law* 27-41 (1982 ed.). In fact, parcels of tribal lands held in trust in Oklahoma have been judicially recognized as reservations under 18 U.S.C. § 1151(a), even though they may not be formally designated as such. *See, Citizen*

Band Potawatomi, 498 U.S. at 511; *Oklahoma Tax Commission v. Sac & Fox Nation*, 508 U.S. at ___ ("Congress has defined Indian country broadly to include formal *and informal* reservations, dependent Indian communities, and Indian allotments. . . . " (emphasis added).

In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), the U.S. Supreme Court stated that "Indian allotments, the Indian titles to which have not been extinguished," remain subject to federal and tribal jurisdiction even if a tribe's reservation boundaries are erased. *Id.* at 427 n.2. The Court went on to explain that a remaining checkerboard of allotted lands still held in trust that remain after reservation boundaries are disestablished can form an adequate geographic basis for tribal jurisdiction. Noting that the tribe had ceded all its unallotted lands within the original reservation boundaries, the Court stated:

> But, as the historical circumstances make clear, this was not because the tribe wished to retain its former reservation, undiminished, but rather because the tribe and the Government were satisfied that *retention of allotments would provide an adequate fulcrum for tribal affairs.*

420 U.S. at 446 (emphasis added). In *Solem v. Bartlett*, the U.S. Supreme Court indicated that "(r)egardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of opened lands that were and have remained Indian allotments." *Solem v. Bartlett*, 465 U.S. 463, 467 (1984). Additionally, the Tenth Circuit has specifically held that allotted Cheyenne-Arapaho lands are "Indian

country." *Cheyenne-Arapaho Tribes v. State of Oklahoma*, 618 F.2d at 667-69.

Similarly, in *United States v. Pelican*, 232 U.S. 442 (1914), the U.S. Supreme Court stated the following regarding allotted lands:

> [T]he original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands. . . . The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restriction. But meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through the distribution into separate holdings. . . .

232 U.S. at 449 (citations omitted). *Pelican* makes it clear that, for purposes of jurisdiction, allotted lands remain subject to federal and tribal jurisdiction. The fact that the title to such lands are held by individuals is irrelevant to the question of which government has jurisdictional authority over the allotments.

We note that Congress has established a clear and specific procedure by which a tribe may give up jurisdiction over trust lands to a state, under the provisions of Public Law 280, 67 Stat. 58, 28 U.S.C. § 1360. Procedures for a state to acquire jurisdiction over Indian country must also be explicitly followed; otherwise, such exercises of authority may not be valid. *Kennedy v. District Court*, 400 U.S. 423 (1971). *See* 18 U.S.C. § 1162. Public Law 280 has no application in Oklahoma, however. *Oklahoma Tax Commission v. Sac & Fox*

Nation, 508 U.S. at ___; *Ahboah v. Housing Authority of the Kiowa Tribe of Indians*, 660 P.2d 625, 630-632 (Okla. 1983).

The U.S. Court of Appeals for the Tenth Circuit has also recently held in that if an area loses its reservation boundaries, the remaining allotted lands within the former reservation remain subject to tribal and federal jurisdiction. *Pittsburgh & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir. 1990). Mustang argued in its brief that the *Pittsburgh* case stood for the proposition that "where the boundaries were diminished or disestablished, the tribal jurisdiction was eliminated." Appellants' Brief at p. 23. The *Pittsburgh* case does not support this argument, nor is Mustang's statement an accurate characterization of its holding. In *Pittsburgh*, the Tenth Circuit stated that even though a portion of the Navajo Reservation was disestablished, nonetheless, the tribe still retained jurisdiction over allotted lands in the former reservation area that remained Indian country under 18 U.S.C. § 1151(b) and (c). The court upheld such a result even though such a determination would lead to a "checkerboard" area under tribal jurisdiction. The Tenth Circuit in *Pittsburgh* said:

> Comparably, *DeCoteau v. District County Court* concludes that the *allotted* lands within what was the Lake Traverse Indian Reservation lost their reservation status when the unallotted lands were ceded. What they did not lose, however, was their Indian country status under 18 U.S.C. § 1151(c).
>
> * * *
>
> In other words, *DeCoteau* stands for the proposition that the entire reservation is terminated. It

> does not hold that the remaining allotments are reservation (sic); instead, they are Indian country by virtue of being allotments under 18 U.S.C. § 1151(c).
>
> * * *
>
> The Supreme Court has allowed such checkerboarding to stand in cases such as *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, and *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914). It is well to remember that Congress has authorized checkerboard jurisdiction under its definition of Indian country in 18 U.S.C. § 1151. Although subsection 1151(a) clarifies that checkerboard *titles* within an existing reservation do not affect the status of an Indian reservation as reservation, subsections 1151(b) and (c) allow checkerboard *jurisdiction* outside reservation boundaries.

Pittsburgh & Midway Coal Mining Co. v. Yazzie, 909 F.2d at 1421, 1422. We conclude that the allotted lands at issue in this case fall within the definition of § 1151(c), as the District Court properly concluded. Consequently, allotted lands are subject to tribal jurisdiction, including the Tribe's inherent authority to impose taxes to support governmental services.

The jurisdictional authority of tribes in Oklahoma over the remaining parcels of allotted Indian country trust lands has repeatedly been recognized by tribal, federal, and state court decisions despite language found in

other allotment agreements which opened the reservations to homesteading in a manner similar to the Allotment Act affecting the Cheyenne-Arapaho. *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d at 667-68; *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 82-83 (Okla. 1985) (trust allotments are Indian country); *Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d at 628-29 ("Individual trust allotments have long been recognized as Indian country"). In *Ahboah*, the Oklahoma Supreme Court *specifically rejected* an argument very similar to the one made by Mustang in this case.

In *Ahboah*, the Housing Authority of the Kiowa Tribe of Indians of Oklahoma ("Housing Authority") asserted that "cede and convey" language from an allotment agreement for the Comanche, Kiowa, and Apache Tribes effected the termination of jurisdiction over the entire reservation area, and the allotments remaining after the reservation were outside the scope of tribal civil jurisdiction. The Oklahoma Supreme Court noted that such an argument was without merit. The court in *Ahboah* stated:

> The Housing Authority's first argument rests on the language found in Article I of the Treaty:
>
> > Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa and Apache tribes of Indians in the Indian Territory, . . . *the said Comanche, Kiowa and Apache Indians hereby cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands embraced* [within the

> Comanche-Kiowa-Apache reservation]. (Emphasis supplied).

The Housing Authority interprets this language as a total cession of all tribal interest in the reservation to the federal government, which operated to totally extinguish the Indian character of the land.

* * *

The Housing Authority's position is untenable as it ignores dispositive holdings of the United States Supreme Court. A similar argument was made and rejected in *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916). The Supreme Court noted that only Congress had the authority to terminate tribal relations and divest the federal government of jurisdiction over trust allotments and allottees. See 241 U.S. at 600, 36 S.Ct. at 698-99.

* * *

Moreover, the Housing Authority errs in assuming that trust allotments must be within a continuing reservation to retain their Indian character. Individual trust allotments have long been recognized as Indian Country, whether within or without continuing reservation boundaries. *DeCoteau v. District County Court*, 420 U.S. 425, 427, 95 S.Ct. 1082, 1084, 43 L.Ed.2d 300 (1975) n.2. See also *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914). The test, as articulated by the Supreme Court, is whether the land in question has been "validly set apart for the

> use of the Indians as such, under the superintendence of the Government." *Pelican, supra,* 232 U.S. at 449, 34 S.Ct. at 399.

Similar "cede and convey" language is found in the allotment agreement affecting the Sac & Fox Nation's Oklahoma reservation. In the text of the Sac & Fox Nation's Allotment Agreement there is not even a clause indicating that the Tribe's cession of land within its reservation was "subject to" the retention of allotments. 26 Stat. 750-751. Despite such language in the Sac & Fox Allotment Agreement, the U.S. Supreme Court nevertheless held that the Sac & Fox Nation fully retained jurisdiction over its allotted lands within the original reservation that was ceded to the United States because they were Indian country. The justices indicated, "we ask only whether the land is Indian country . . . the intent of Congress as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted allotments." *Oklahoma Tax Commission v. Sac & Fox Nation,* 508 U.S. at ___.

The "Indian country" statute, 18 U.S.C. § 1151, simply codifies pre-existing territorial jurisdiction recognized by judicial decisions which designates the geographic area over which federal and tribal jurisdiction is exercised and from which state jurisdiction is generally excluded.[10] Numerous other courts have consistently

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[10] The issue of disestablishment is relevant only to issues of jurisdiction over non-Indian fee lands within the original reservation boundaries. *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967, 975 (10th Cir. 1987).

held that 18 U.S.C. § 1151 applies equally to both *civil* and criminal jurisdiction. In fact, the *DeCoteau* case, relied upon by most courts for this holding involved both criminal and civil jurisdictional issues.

The United States Congress knows specifically how to affect the governmental powers of Indian governments over lands remaining in trust or otherwise subject to tribal jurisdiction. *See* 25 U.S.C. § 232 and 25 U.S.C. § 233 (granting New York jurisdiction over Indian country in the state). Even in such instances where specific statutes divested Indian tribes of certain powers such as the power to have court systems, appellate federal courts have concluded that changes in federal policy and adoption of statutes supporting tribal government such as the OIWA, have implicitly repealed such divestitures of tribal governmental authority. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1446 (1988), *cert. den.*, 488 U.S. 1010 (1989). We have no such clear divestitures of tribal jurisdictional authority in this case. This court agrees with the findings of the District Court that the legislative history and the surrounding circumstances confirm that the Allotted Lands of the Cheyenne-Arapaho Tribes remained subject to tribal civil and criminal jurisdiction.

Following the case *State v. Littlechief*, 573 P.2d 263 (Okla. Crim. App. 1978), tribal and federal officials recognized the need for judicial forums to adjudicate disputes arising within Indian Country in western Oklahoma, which included the Cheyenne-Arapaho, and for this reason in 1979 established Courts of Indian Offenses pursuant to 25 C.F.R. § 11.1 *et seq.*, *See* 44 Fed. Reg. 375.02; 58 Fed. Reg. 54406; 25 C.F.R. § 11.100(18) (1993). The Cheyenne-Arapaho were included with other tribes in western

Oklahoma that were served by the Court of Indian Offenses court system in 1979, indicating that the Tribes retained civil and criminal jurisdiction over the allotted lands, contrary to the argument of Mustang. In fact, the majority of the caseload handled by the Cheyenne-Arapaho District Court was inherited from the Court of Indian Offenses, when the Cheyenne-Arapaho District Court was organized in 1988.

Other federal statutes consistently indicate that Congress treats allotted lands as being subject to tribal jurisdiction simply by virtue of their status as being allotments or characterization as Indian country. For example, under the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, tribes may contract and receive federal funding for certain programs and services, including the operation of tribal courts, which exercise jurisdiction over tribal and allotted trust lands. Other statutes such as the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, and the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§ 2701-2721, specifically include allotted lands within the defined territory over which tribes may exercise their jurisdiction. 25 U.S.C. § 1903(10); 25 U.S.C. § 2703(4).

As the court cases, statutes and evidence show, the late-nineteenth century policy of allotment has had little effect on tribal jurisdiction or the governmental power tribes may exercise over allotted lands that continue to remain in trust or restricted status. The U.S. Supreme Court has also recognized that "[t]he policy of allotment and sale of surplus reservation land was repudiated in 1934 by the Indian Reorganization Act." *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 479 (1976). The

allotment policy was halted and reversed before it ever reached its ultimate goal of complete dissolution of tribal governments and tribal jurisdiction. In fact, the only remaining viable area of jurisdiction for many tribes are the allotments still held in trust since in many instances all tribal lands were allotted, leaving few, if any, lands still held in common tribal ownership.

Under controlling law, principles, and policy, we conclude that the allotted lands of the Cheyenne-Arapaho remain subject to tribal civil jurisdiction, including the inherent tribal authority to tax activities on such lands. Fur purposes of tribal jurisdiction, criminal and civil, allotted lands are indistinguishable from other tribal trust lands and dependent Indian communities. The Cheyenne-Arapaho Tribes therefore properly may exercise tribal power to tax the activities of those who avail themselves of the substantial privilege of doing business on and taking valuable resources from Indian lands, including non-Indians and non-Indian entities. *Merrion v. Jicarilla Apache Tribe,* 455 U.S. at 141-142; *Kerr McGee Corp. v. Navajo Tribe,* 471 U.S. 195 (1985). In summary, this court affirms the findings and conclusions of the District Court that the Cheyenne-Arapaho Tribes may validly tax the activities of Mustang on allotted lands remaining in trust that are characterized as "Indian country."

IT IS SO ORDERED on this 31st day of December, 1993.

[SEAL]

/s/ Arvo Q. Mikkanen
ARVO Q. MIKKANEN,
CHIEF JUSTICE

CONCURRING:

CHARLES G. TATE,
ASSOCIATE DISTRICT
JUDGE SITTING BY
DESIGNATION

STEVEN L. TOLSON,
SPECIAL ASSOCIATE JUSTICE

IN THE SUPREME COURT
OF THE CHEYENNE & ARAPAHO TRIBES

MUSTANG FUEL CORPORATION, et al.,	)	
Plaintiffs/Appellants,	)	*No. CNA-SC-91-02*
v.	)	
CHEYENNE-ARAPAHO TAX COMMISSION, et al.,	)	
Defendants/Appellees.	)	

(Filed Jan. 5, 1994)

BEFORE: Arvo Q. Mikkanen, Chief Justice, Charles G. Tate, Associate District Judge, sitting by designation, and Steven L. Tolson, Special Associate Justice.

JUDGMENT AFFIRMING DECISION OF THE DISTRICT COURT OF THE CHEYENNE-ARAPAHO TRIBES

NOW COMES the Court Clerk for the Supreme Court, Patricia A. White, pursuant to Section 461 of the Appellate Procedure Code of the Cheyenne-Arapaho Tribes of Oklahoma, and hereby enters judgment in this action in favor of the Defendants/Appellees Cheyenne-Arapaho Tax Commission, in accordance with the decision of the Cheyenne-Arapaho Supreme Court dated December 31, 1993 and filed January 3, 1994.

DONE this 5th day of January, 1994.

/s/ Patricia A. White
CLERK OF COURT

DISTRICT COURT
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA
P. O. BOX 102
CONCHO, OKLAHOMA 73022

MUSTANG FUEL CORPORATION, WARD PETROLEUM, AMOCO PRODUCTION COMPANY, ANSON CORPORATION, APACHE CORPORATION, CONOCO, INC., PHILLIPS PETROLEUM COMPANY, SUN EXPLORATION AND PRODUCTION CO., as managing general partners of SUN OPERATING limited partnership, MESA MID-CONTINENT LIMITED PARTNERSHIP, TEXACO INC., TEXACO PRODUCING COMPANY, UNION OIL COMPANY OF CALIFORNIA, (d/b/a/ Unocal), NGC ENERGY COMPANY, BOGERT OIL COMPANY, KAISER-FRANCIS OIL COMPANY, SENECA OIL COMPANY, UNIT DRILLING AND EXPLORATION CO., and VIERSEN & COCHRAN, Plaintiffs, vs. CHEYENNE-ARAPAHO TAX COMMISSION, CHEYENNE-ARAPAHO BUSINESS COMMITTEE, JUANITA LEARNED, ALTON HARRISON,	Case No: CNA-CIV-89-7

EDGAR HEAP OF BIRDS, VIOLA HATCH, FLOYD BLACKBEAR, JONATHAN BURGESS, CHRISTINE GEORGE, KRIS LITTLERAVEN, and MARLIN HAWK,

Defendants.

MEMORANDUM OF LAW

(Filed Jan. 31, 1991)

In this action, the Plaintiffs, Mustang Fuel Corporation, et al., hereafter Mustang, challenges the authority of the Cheyenne and Arapaho Tax Commission to levy the gross production taxes on hydrocarbons produced on allotted lands belonging to individual Indians within the Cheyenne and Arapaho jurisdiction. The Plaintiffs assert that the Cheyenne and Arapaho reservation was disestablished by the Allotment and Cession Agreement of 1890 and ratifying the Act of March 3, 1891, 26 Stat. 989., and the 1891 Act divested the Cheyenne and Arapaho Tribes of territorial jurisdiction over these allotted land [sic].

II.

MOTION FOR SUMMARY JUDGMENT

Presently before the Court is the Cheyenne and Arapaho Tribes' Motion for Summary Judgment and Mustang Fuel Corporation's, et al., Cross Motion for Summary Judgment. Virtually all of the evidence submitted by the parties consists of undisputed historical documents. In a situation where the facts are not in dispute, as here, the

case is well suited for Summary Judgment. Title II Law and Order Code of the Cheyenne and Arapaho Tribes; Chapter 9-3, Section 905, (c), Fed. R. Civ. P., 56, (c).

III.

JURISDICTION

Tribal Court jurisdiction must be determined prior to a determination of the merits of this matter. *National Farmers Insurance Company vs. Crow Tribe of Indians,* 105 S. Ct., 2447 (1985), *Iowa Mutual Insurance Company vs. La Plante,* 107, S. Ct., 971., (1987). Civil jurisdiction over non-Indians within Indian Country presumptively lies in the Tribal Court unless affirmatively limited by a specific treaty or federal statute. *Iowa Mutual,* supra.

"Indian Country" includes trust allotments, 18 U.S.C. § 1151, *DeCouteau vs. District Court,* 420 U.S. 425, (1975); *Cheyenne and Arapaho Tribes vs. Oklahoma,* 618 F. 2d 665, (10th Circuit, 1980). Nothing in the Treaty of October 14, 1865, 14 Stat. 703., the Treaty of October 28, 1867, 15 Stat. 593, Executive Order dated August 10, 1869 and the Cheyenne and Arapaho Cession Agreement of 1890, ratified on March 3, 1891, 26 Stat. 989 limits the civil jurisdiction of the Cheyenne and Arapaho Tribes.

Therefore, civil jurisdiction lies with the Cheyenne and Arapaho Tribal Court since this case involves the Tribal Tax Commission's authority to tax activities of non-Indians on allotted lands as defined in 18 U.S.C. Section 1151.

IV.

ISSUE PRESENTED

The issue raised in this litigation and now before the Court is whether the Cheyenne and Arapaho Tribes' of Oklahoma Tax Commission's authority to enforce it's taxes on allotted lands was divested by the Cheyenne and Arapaho Allotment and Cession Agreement of 1890, 26 Stat. 989.

V.

ANALYSIS

In *Merrion vs. Jicarilla Apache Tribe,* 455 U. S. 130, (1982), the United States Supreme Court recognized the "power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management". Id at 137. In *Washington vs. Confederated Tribes of Colville Indian Reservation,* 447 U. S. 134, (1980), the court stated, "the power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status", 455 U. S. at 137. The power of an Indian Tribe to tax derives from the tribes general authority, as sovereign, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises involved in economic activities within that jurisdiction, 455 U. S. at 137. Therefore, "a tribe has the power to tax non-members only to the extent the non-member enjoys the privilege of trade or other

activity on the reservation to which the tribe can attach a tax". 455 U.S. at 141-42. The Court recognized that there exists a "significant territorial componet [sic] to tribal power: a tribe has no authority over a non-member until the non-member enters tribal land or conducts business with the tribe", 455 U. S. at 142.

In this matter, Mustang Fuel Corporations challenge to the contested tax is predicated on its conclusion that the territorial componet [sic], essential to the tribes valid exercise of the tribe's taxing authority, was divested as to the allotted lands, by the Cheyenne and Arapaho Allotment and Cession Agreement of 1890.

Analysis must begin with the history of the Cheyenne and Arapaho Allotment and Cession Agreement. The Cheyenne and Arapaho reservation was created by congressional act by the Treaty of October 28, 1867, (15 Stat. 593). The Cheyenne and Arapaho did not settle this land, but instead settled on the south side of the North Fork of the Canadian River. The reservation that the tribe was located on was then set aside by Executive Order dated August 10, 1869. The tribe's therefore, held full beneficial fee interest to all of the land comprising the reservations which was created by the Executive Order. On March 3, 1891, 26 Stat. 989, Congress ratified the Cheyenne and Arapaho Allotment and Cession Agreement of 1890. The Cheyenne and Arapaho Tribes were forced to accept individual allotments carved out of the reservation and to sell surplus lands for non-Indian settlements. The Surplus Land Acts were the result of the view that Indians should be assimilated into american society and an increasing demand for new lands. *Solem vs. Barnett*, 465 U. S. 463, (1984).

Consistent with the "plenary power" of Congress in Indian Affairs, Congress may extinguish tribal interest in real property subject to the Fifth Amendment requiring just compensation. *Shoshone Tribe vs. United States,* 299 U. S. 476, (1937); *Choate vs. Trapp,* 224 U. S. 665, (1912).

Consequently, Congress has complete discretion to determine when to extinguish Indian title to a reservation.

In determining whether Congress elected to extinguish Indian title, the rule of construct is that doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of the Indians, *Choate vs. Trapp,* supra. In *Menominee Tribe vs. United States,* 391 U. S. 404, (1968), the court reinterated [sic] that an intent to abrogate Indian rights would not be "lightly inputed [sic] to Congress", finding it difficult to conceive that Congress, without explicit statements, would subject itself to a claim for compensation by destroying a tribe's property rights.

In determining whether Congress, and the Tribes in the Cession Agreement extinguished the tribes territorial jurisdiction, the court must examine the text of the legislative history attendants, and consider the circumstances surrounding the legislation. *Rosebud Sioux Tribe vs. Kneip,* 430 U. S. 584, (1977), *Mattz vs. Arnett,* 412 U. S. 481, (1973).

Mustang construes the Act of March 3, 1891, as extinguishing tribal interest in the lands allotted in severalty to individual tribal members. The tribes, however, take the position that the allotment of tribal lands to tribal members was the result of an agreement between the

Tribes and the United States. Congress did not intend to extinguish the governmental authority held by the tribes in the lands comprising the allotments. Rather the Tribe's Allotment and Cession Agreement was negotiated by the Tribe's and approved by the Federal Government on March 3, 1891, was to open surplus lands for non-Indian settlement.

The Act of March 3, 1891, 26 Stat. 989, provided in specific terms in Article II:

> "Subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapaho Tribe of Indians, as hereinafter provided for and subject to the conditions hereinafter imposed, for the consideration, hereinafter mentioned, the said Cheyenne and Arapaho Indians hereby cede, convey, transfer, relinquish and surrender forever and absolutely, without any reservation whatever express or implied, all their claim, title and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian territory"

The Cheyenne and Arapaho Cession Agreement and the General Allotment Act did not speak to the governing power of the tribes. The General Allotment Act is a Property Act and only speaks to which sovereign (tribe vs. State) will have jurisdiction over the allottees and the allotted property. Section 6 of the Act of February 8, 1887, Ch. 119 § 6, 24, Stat. 388, 390, (1887) provided:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands of tribes of Indians to whom allotments have

> been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no territory shall pass or enforce any law denying any such Indians within its jurisdiction the equal protection of the law."

For many years, it was thought that this act subjected the allottees to the jurisdiction of the State or territory as soon as trust patents had issued and this view was adopted by the United States Supreme Court. *In re: Heff*, 197 U. S. 488, (1905). However, this viewpoint was questioned and overruled in *United States vs. Nice*, 241 U. S., 601, (1915). In *Nice*, the Supreme Court stated that the actions of Congress and the Executive Branch after the passage of the Act, had clearly indicated that the federal government had intended to retain jurisdiction until title to the allotments had been vested in the allottees in fee simple. That the provisions of the General Allotment Act neither terminated the reservations nor subjected the allottees to state jurisdiction was emphasized by the 1906 amendment to the General Allotment Act, more commonly known as the *Burke Act*:

> "That at the expiration of the trust period and when the lands have been conveyed to the Indian by patent in fee, as provided by section five of this Act, then each and every alottee [sic] shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside. *Provided further*, that until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to exclusive jurisdiction of the United States". Act of May 8, 1906, Ch. 2348, § 5, 34 Stat. 182 (1906).

Thus, the provisions of the General Allotment Act has no effect or the power of the tribes to govern and only subjects the allotments to state jurisdiction once land is taken out of trust status and title is vested in the allottee in fee simple absolute. Therefore, the Individual Allotment Agreement of the Cheyenne and Arapaho Tribes must be considered to determine if any limitations were imposed.

A review of the Cheyenne and Arapaho Cession Agreement and the legislative history reveals no agreement which modifies or limits the power of the tribal government.

The Cheyenne and Arapaho reservation has been judicially determined to be extinguished by the Tenth Circuit Court of Appeals in the case of *Ellis v. Page*, 351 F, 2d, 250, (10th Circuit, 1965), but the reasoning of the 10th Circuit Court has been undermined by recent Supreme Court rulings. See *DeCouteau v. District Court*, 420 U. S. 425, 445, (1975).

However, *DeCouteau vs. District Court; supra*, established that not withstanding reservation extinguishment and abolition of the reservation boundaries, the federal government and the tribes retain exclusive jurisdiction over the allotments until Indian Title is extinguished. The Court stated:

> "It is common ground here that Indian conduct occurring on the trust allotments is beyond State's jurisdiction, being instead the proper concern of tribal or federal authorities".
>
> Id. at 428.

Based upon the foregoing:

IT IS ORDERED THAT, the Cheyenne and Arapaho Tribes Motion for Summary Judgment is granted to the effect that the individual alloted [sic] lands of the Cheyenne and Arapaho Tribal Members are now, and always have been a part of the Cheyenne and Arapaho Indian reservation, and that said allotments are "Indian Country" as the term is defined by federal law, and that said allotments are subject to taxation by the tribal government.

IT IS FURTHER ORDERED THAT, the Motion for Summary Judgment filed by Mustang Fuel Corporation is denied.

The Court Clerk is instructed to enter the Judgment with the Memorandum Opinion into the docket book pursuant to Section 907: Title II – Law and Order Code, due to the Courts delay in filing the accompanying Memorandum Opinion. Pursuant to Section 909; the date of entry of the final judgment is hereby designated as JANUARY 31st, 1991.

SO ORDERED.

BY: /s/ George Tahbone Jr
George Tahbone, Jr. – CHIEF JUDGE
DISTRICT COURT
Cheyenne-Arapaho Tribes of Oklahoma
700 North Black Kettle Boulevard
Post Office Box 102
Concho, Oklahoma 73022

DISTRICT COURT
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA
P. O. BOX 102
CONCHO, OKLAHOMA 73022

MUSTANG FUEL CORPORATION, AMOCO PRODUCTION COMPANY, ANSON CORPORATION, APACHE CORPORATION, CONOCO, INC., PHILLIPS PETROLEUM COMPANY, SUN EXPLORATION AND PRODUCTION COMPANY, as managing general partners of SUN OPERATING limited partnership, MESA MID-CONTINENT LIMITED PARTNERSHIP, TEXACO INC., TEXACO PRODUCING COMPANY, UNION OIL COMPANY OF CALIFORNIA, (d/b/a/ Uncocal) [sic], NGC ENERGY COMPANY, BOGERT OIL COMPANY, KAISER-FRANCIS OIL COMPANY, SENECA OIL COMPANY, UNIT DRILLING AND EXPLORATION COMPANY, VIERSEN & COCHRAN, Plaintiffs, vs. CHEYENNE-ARAPAHO TAX COMMISSION, CHEYENNE-ARAPAHO BUSINESS COMMITTEE, JUANITA	Case No: CNA-CIV-89-07

LEARNED, ALTON HARRISON, EDGAR HEAP OF BIRDS, VIOLA HATCH, FLOYD BLACKBEAR, JONATHAN BURGESS, CHRISTINE GEORGE, KRIS LITTLERAVEN, and MARLIN HAWK,

Defendants.

JUDGMENT

(Filed Dec. 19, 1990)

The Court concludes that the form of the Allotment Agreement of October 31, 1890, as ratified by § 13 of the Act of March 3, 1891, 26 Stat. 1022, (1891), the legislative history, and the surrounding events do not demonstrate the necessary congressional intent to disestablish the alloted [sic] lands of the Cheyenne and Arapaho Reservation which was established by Executive Order on August 10, 1869.

Subsequent events and pragmatic factors fail to show that alloted [sic] lands owned by individual tribal members were disestablished. Instead, the allotments selected were "subject to" the Cheyenne and Arapaho cession of tribal land.

The alloted [sic] lands remain what they always have been, a part of the Cheyenne and Arapaho Reservation. The Cheyenne and Arapaho Tax Commission does have the authority to impose or enforce the Cheyenne and Arapaho Tax Ordinance with respect to the alloted [sic] lands.

Based upon the foregoing;

IT IS ORDERED THAT, the Cheyenne and Arapaho Tribes Motion for Summary Judgment is granted to the effect that the individual alloted [sic] lands of the Cheyenne and Arapaho Tribal Members are now, and always have been a part of the Cheyenne and Arapaho Indian Reservation, and that said allotments are "Indian Country" as the term is defined by federal law.

IT IS FURTHER ORDERED THAT, the Motion for Summary Judgment filed by Mustang Fuel Corporation is denied.

A memorandum opinion will be provided to all parties concerned by the Cheyenne and Arapaho District Court.

IT IS SO ORDERED, in the District Court of the Cheyenne and Arapaho Tribes of Oklahoma this 20th day of December, 1990.

/s/ George Tahbone Jr
George Tahbone, Jr.
CHIEF JUDGE – DISTRICT COURT
Cheyenne-Arapaho Tribes of Okla.
700 North Black Kettle Boulevard
Post Office Box 102
Concho, Oklahoma 73022

ORDINANCE NO. 8118003

AN ORDINANCE ESTABLISHING THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA GENERAL REVENUE AND TAXATION ACT OF 1988

ENACTED ON
APRIL 27, 1988
BY THE 26TH BUSINESS COMMITTEE
RESOLUTION NO. ___
ORDINANCE NO. 8118003

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GENERAL REVENUE AND TAXATION

Section 1. Citation

This Title may be cited as the Cheyenne-Arapaho Tribes General Revenue and Taxation Act of 1988.

Section 2. Purpose

It being necessary to strengthen the tribal government of the Cheyenne-Arapaho Tribes by licensing and regulating certain conduct within the tribal jurisdiction, to provide financing for expenses of the tribal government, and to provide financing for expenses of tribal government operations and services in order for the Cheyenne-Arapaho Tribes to efficiently and effectively exercise its confirmed governmental responsibilities within the Indian Country subject to the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma, the purpose of this Title is to provide simple, fair, straight forward and efficient procedures, provide for the licensing and regulation of certain conduct, and the levy and collection of certain revenue and taxes.

Section 3. Use of Tax Revenues

(a) All tax revenues shall be appropriated to provide essential tribal government services, including, but not limited to:

(1) Police and fire protection;

(2) Establishment of tribal courts;

(3) Road construction, repair and maintenance;

(4) Water, sewage, and garbage disposal;

(5) Education of children;

(6) Public health;

(7) Industrial assistance and advancement and development of tribal enterprises to

address chronic unemployment and chronic poverty among tribal members;

(8) Public recreation;

(9) Acquisition of land and general administration of Indian property; and

(10) Other essential tribal services.

(b) Except in emergency situations requiring immediate and unforseen expenditure of funds to protect the public safety, health, or welfare, tax monies shall not be appropriated for expenditure during the fiscal year in which they are collected, but may be appropriated and expended during the next fiscal year or any succeeding fiscal year after collection.

CHAPTER ONE

CHEYENNE-ARAPAHO TAX COMMISSION

Section 101. Tax Commission Created

There is hereby created, ordained, and chartered with respect to the Cheyenne-Arapaho Tribes of Oklahoma a public body politic to be known as the "CHEYENNE-ARAPAHO TAX COMMISION" which shall be an agency of the Cheyenne-Arapaho Tribes of Oklahoma subordinate to the Business Committee, possessing all powers, duties, rights, and functions hereinafter defined, and as are now or as may hereafter be conferred upon it by law.

Section 102. Composition of Tax Commission

The members of the Cheyenne-Arapaho Tax Commission shall consist of the Treasurer, who shall serve as the Chairman of the Commission; and four (4) additional at

large members who shall be appointed by, and serve at the pleasure of the Business Committee. Neither an appointment nor a removal of any at large member of the Tax Commission shall be of any force or effect until a written resolution reflecting such appointment or removal has been filed for record in the official tribal records maintained by the Secretary's office.

Section 103. Temporary Appointments

Whenever it is in the best interest of the Tribe to do so, the Business Committee and the Tax Commission may make such temporary appointments as shall be useful or necessary for the effective implementation of the Tribal tax laws.

Section 104. Seal

The Cheyenne-Arapaho Tax Commission is authorized and directed to acquire and use a seal which shall be circular in form, with the words "TAX COMMISSION – CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA" around the edge thereof, and the word "seal" in its center. The seal shall be impressed upon the originals or certified copies of all licenses, orders, rules, and other official documents of the Commission as evidence of their authenticity and authority

Sections 105-110. Reserved

Section 111. General Powers of the Tax Commission

The Tax Commission shall generally be charged with the administration and enforcement of all tribal tax laws.

Incidental to the administration or enforcement of the tribal tax laws, the Tax Commission shall have the power to:

(a) Assess, collect, and issue receipts for such taxes as are imposed by ordinance of the Business Committee and to bring actions on behalf of the Tribe in the tribal Court for the collection of tribal taxes, penalties and interest, and the enforcement of the tribal tax laws, all such actions shall be styled: The Cheyenne-Arapaho Tribes of Oklahoma ex rel. Tax Commission vs. _____;

(b) Administer oaths, conduct hearings, and, by subpoena, to compel the attendance of witnesses and the production of any books, records, and papers of any taxpayer relating to the enforcement of the tribal tax laws;

(c) Make, or cause to be made by its agents or employees, an examination or investigation of the place of business, equipment, facilities, tangible personal property, and the books, records, papers, vouchers, accounts, documents, and financial statements of any taxpayer, upon reasonable notice, during normal business hours, at any other time agreed to by said taxpayer, or at any time pursuant to a search warrant signed by the tribal Court;

(d) Examine, under oath, either orally or in writing any taxpayer or any agent, officer, or employee of any taxpayer, or any other witness in respect to any matter relative to the tribal tax laws;

(e) Exercise all other authority delegated or conferred upon it by law, or as may be reasonably necessary

in the administration or enforcement of any tribal tax laws.

Section 112. Rulemaking Authority

(a) The Tax Commission shall have the authority to prescribe, promulgate, and enforce written rules and regulations not inconsistent with this Title to provide for its internal operational procedures; or to interpret or apply any tribal tax laws as may be necessary to ascertain or compute the tax owing by any taxpayer, or for the filing of any reports or returns required by any tribal tax laws, or as shall be reasonably necessary for the efficient performance of its duties, or as may be required or permitted by law.

(b) No rule or regulation of the Tax Commission shall be of any force or effect until and unless a certified copy of said rule or regulation bearing the signatures of at least two members of the Tax Commission and the official seal of the Tax Commission shall have been filed for record in the office of the tribal Secretary and the office of the Clerk of the tribal Court.

(c) The tribal Court shall take judicial notice of all rules of the Tax Commission promulgated pursuant to this Title.

Section 113. Forms

The Tax Commission may prepare and make available to the public such standard forms as are or may be necessary to carry out its functions and which are not otherwise provided for by this Title.

Section 114. Tax Stamps and Licenses

(a) The Tax Commission shall provide for the form, size, color, and identifying characteristics of all licenses, permits, tax stamps, tags, receipts, or other documents or things evidencing receipt of any license or payment of any tax or fee administered by the Tax Commission or otherwise showing compliance with the tax laws of the Cheyenne-Arapaho Tribes of Oklahoma.

(b) Such stamps or licenses shall contain at least the following information:

(1) The words: "Cheyenne-Arapaho Tribes"

(2) The words: "Tax Commission"

(3) The monetary amount for which the tax or license was issued.

(4) Wording which indicates the type of tax imposed

(5) If the instrument is a license, permit or receipt, wording indicating the type of license, permit, or receipt, its effective dates, and the name and address of the taxpayer to whom issued.

(c) The Tax Commission shall provide for the manufacture, delivery, storage, and safeguarding of such stamps, licenses, permits, tags, receipts, or other documents and shall safeguard such instruments against theft and counterfeiting.

(d) When the Tax Commission deems it necessary to do so, it may allow the use of metering devices in lieu of

paper stamps under such rules and regulations as it shall prescribe.

(e) The Tax Commission may exchange new stamps for damages, out of date, or other unusable stamps under such rules and regulations as the Tax Commission shall prescribe.

Section 115. Records

(a) The Tax Commission shall keep and maintain accurate, complete, and detailed records which reflect all taxes, penalties, and interest levied, due, and paid, all licenses issued, and each and every official transaction, communication, or action of the Commission.

(b) Such records shall be maintained at the tribal Headquarters and shall not be removed from said building absent the consent of the Business Committee by resolution.

(c) Such records shall be subject to audit at any time upon the direction of the Business Committee and shall be audited not less than once each year by the Tax Commission.

(d) Any record of the Tax Commission, (except the record of an official decision or opinion rendered upon a administrative appeal), which relates to the individual business or personal activities of a named particular taxpayer or taxpayers shall not be open to public inspection and shall be released only to the taxpayer involved, tribal officials who have a legitimate official need for such records, or upon order of the tribal Court for good cause shown.

(e) Any record of the Tax Commission which does not relate to the individual business or personal activities of a named particular taxpayer or taxpayers, and all decisions or opinions rendered upon a administrative appeal, shall be public records of the Tribe and shall be available for public inspection during regular business hours. Copies of such records may be obtained by payment of such copying cost as may be established by rule of the Commission, *provided,* that names and other identification of any taxpayer appearing in such record shall be rendered unreadable prior to issuance of such copy unless the provisions of subsection (d) above would allow release of such information.

Section 116. Bookkeeping

There shall be established and kept such financial record books as may be necessary under generally applicable accounting standards to adequately account for all funds and monies received by the Commission on behalf of the Tribe. Separate books shall be maintained for each type of tax imposed by this Title.

Section 117. Treasury Tax Account – Deposits

(a) There is hereby authorized and directed to be established an account in some federally insured financial banking institution to be known as the Cheyenne-Arapaho Treasury Tax Account.

(b) The Treasury Tax Account shall be an interest bearing account and the funds therein may be invested

and reinvested as may be recommended by the Tax Commission and approved by the Treasurer of the Cheyenne-Arapaho Business Committee.

(c) No monies shall be released or expended from the Treasury Tax Account except upon a written appropriations resolution of the Tribal Council or an annual appropriations ceiling resolution of the Tribal Council as implemented by written resolutions of the Business Committee allocating a specific amount of the monies contained therein for the use of a particular department, agency, or program of the Tribe. Expenditures from this account including refunds to taxpayers pursuant to Section 156 of this ordinance, shall be made only by direct transfer to the account of the receiving department, agency, or program named in such appropriation resolution, and as contained and authorized by the Tribal Council in an annual appropriations ceiling resolution.

(d) All tax monies, license fees, penalties, interest, service fees or charges or other monies collected by the Tax Commission in the administration and enforcement of this Title, except as otherwise specifically authorized by law, shall be deposited in the Treasury Tax Account created in subpart (a) of this section.

Section 118. Tax Suspense Account

(a) Whenever tax money is deposited with the Tax Commission under protest pursuant to Section 15 of this Ordinance, such money shall not be deposited in the Treasury Tax Account, but shall be held in a special Tax Suspense Account to await the final determination of the protest.

(b) If the protest is determined in favor of the protestor, the protestor's money deposited in the Tax Suspense Account shall be returned to him by the Tax Commission as provided by law.

(c) If the protest is determined in favor of the Tax Commission, the money deposited in the Tax Suspense Account shall be transferred by the Tax Commission to the Treasury Tax Account in payment of the taxes, penalties, or interest found to be due.

Sections 119-120. Reserved

Section 121. Tax Commission Employees and Expenses

(a) The Tax Commission may employ such employees and incur such expenses as may be necessary for the proper discharge of its duties subject to the limitations and restrictions herein set out.

(b) The Tax Commission shall, to the maximum extent feasible, utilize regular tribal staff in exercising the duties and responsibilities in this Title set out, and may delegate to the tribal Staff by rule such of its functions as may be necessary to efficiently administer this Title, *provided*, that the Commission's rule-making authority may not be delegated.

(c) The tribal Business Manager is authorized and directed to cause such regular staff assistance as is feasible to be given to the Tax Commission.

(d) The total amount dispersed by the Tax Commission in any one calendar year for the payment of salaries, expenses, and incidentals shall not exceed the amount

appropriated therefore. The Tax Commission shall submit, to the Business Committee, a line item proposed operating budget for the next calendar year not later than the 15th day of June in each year.

Section 122. Bonds

(a) The Tax Commission may require each of its employees who shall be required to handle public monies, revenue, or tax stamps, or who shall be responsible therefore, to give bonds for the honest and faithful performance of their duties, in such amounts as may be fixed by the Commission.

(b) the premiums on any bonds required by this section of the Tax Commission members and its employees shall be paid from funds authorized in the Tax Commission budget.

Section 123. Nepotism

(a) It shall be unlawful for the Tax Commission to employ, appoint, or elect any person related to any member of the Tax Commission, by blood or marriage within the third degree, to any office or position of profit within the Tax Commission, or to any position as an outside or independent contractor. This provision shall not prohibit any officer, appointee, or employee already in the service of the Commission from continuing and being promoted therein after the appointment or election of a relative to membership on the Tax Commission as provided by law.

(b) Each member of the Tax Commission who approves, votes for, or authorized any employment, appointment, or election in violation of this Section and

the person employed, appointed, or elected in violation of this section shall be jointly and severability liable to the Cheyenne-Arapaho Tribes for any and all salaries, wages, commissions, bonuses, fees, expenses, reimbursements, or other thing of value received by virtue of the unlawful appointment of the person so employed, appointed or elected.

(c) If it is in the best interests of the Tribe, the Business Committee may, by written resolution explaining the reasons therefore, provided a waiver of this section in individual cases at the request of the Tax Commission.

Sections 124-130. Reserved

Section 131. Collection of Taxes

The Tax Commission is hereby authorized to bring any necessary action in any appropriate Court for the collection of any taxes, penalties or interest assessed and unpaid. Such action shall be civil in nature and all penalties and interest shall be in the form of civil damages for non-payment. Any civil remedies, including but not limited to garnishment, attachment, and execution, shall be available for the collection of any monies due the Tribe. The Tax Commission may request the tribal Attorney to bring any necessary action for the collection of any taxes, penalties, or interest assessed and unpaid with the approval of the Business Committee previously obtained. In all other cases, the Tax Commission shall be represented in the tribal Court by the tribal attorney.

Section 132. Other Remedies

(a) In addition to the remedies available for the collection of monies, the Tax Commission is authorized to bring an action in any appropriate Court to enjoin the beginning or operation of any unlicensed business, activity, or function when tribal law requires a license be issued for such business, activity, or function.

(b) In addition to the remedies available for the collection of monies, the Tax Commission, by and through the members and staff assigned thereto, is authorized, when accompanied by a police officer, to seize any property which is declared contraband by any section of this Title, or upon which any tax levied is in excess of 60 days past due under the same condition, limitations and exceptions as evidence of crimes may be searched for and seized, provided, that within ten (10) days of such seizure, the Tax Commission shall cause to be filed an action against said property alleging the nonpayment of tax or other lawful reason for such seizure and forfeiture, and upon proof, the court shall order such property forfeited for nonpayment of taxes and title thereto vested in the Cheyenne-Arapaho Tribes of Oklahoma, provided further, that any person claiming ownership, the right to possession or other interest in said property may intervene in said action and raise any defenses which he may have, and such persons shall be served with process if they are known prior to the beginning of the action, provided further, that such persons may redeem said property at any time prior to the entry of a final judgment of forfeiture by depositing all taxes, penalties, and interest assessed or owing with the Court.

Section 133. Inventory of Seized Property

Whenever any authorized person shall seize any property pursuant to Section 132 of this Title he shall inventory and appraise such property and leave a copy thereof with the person from whom it was seized, or, if such person cannot be found, at the place from which said property was seized, and deliver a copy of said inventory to the Tax Commission and the tribal attorney.

Section 134. Public Sale of Forfeited Property

(a) Upon a final order of forfeiture entered by the tribal Court, the Tax Commission shall circulate an inventory of said property to all divisions of the tribal government. Any agency of the tribal government may submit a request to the Business Committee that such portion of said property as they can use be retained for the benefit of the Tribe. The Business Committee shall determine which property will be retained and shall order the Tax Commission to conduct a public sale of the remainder, or to destroy any property which is illegal to possess in all circumstances.

(b) The property to be sold shall be sold at public auction at the tribal headquarters of the Cheyenne-Arapaho Tribes of Oklahoma. Not less than twenty (20) days notice of such sale shall be posted in the tribal Administrative headquarters building and published at least twice in a newspaper of general circulation in the [Concho], Oklahoma area not less than ten (10) days prior to said sale. All funds received at said sale after payment of the cost of said sale shall be deposited in the Treasury Tax Account.

(c) The Tax Commission may conduct such sales at such times as it deems sufficient property has accumulated to make such sale profitable and shall conduct such sales upon direction of the Business Committee.

(d) The seizure, forfeiture, and sale of contraband property shall not reduce or eliminate the tax liability of any person from whom such property was seized. The seizure, forfeiture, and sale of any other property shall reduce the tax liability of the person from whom such property was seized, *provided,* that such person shall not receive any credit for any excess monies derived from such sale.

Section 135. Exempt Property

The following property shall be exempt from garnishment, attachment, execution and sale for the payment of taxes, penalties, and interest due the Cheyenne-Arapaho Tribes of Oklahoma:

(a) Three-fourths (3/4) of the net wages earned per week by the person or an amount equivalent to forty (40) times the federal minimum hourly wages per week, whichever is greater.

(b) One automobile of fair market value equity not exceeding Two Thousand Dollars (2,000.00).

(c) Tools, equipment, utensils, or books necessary to the conduct of the persons business but not including stock or inventory.

(d) Actual Trust or Restricted title to any lands held in trust by the United States or subject to restrictions against alienation imposed by the United States but not

including leasehold and other possessory interests in such property.

(e) Any dwelling used as the actual residence of the taxpayer including up to five acres of land upon which such dwelling is located whether such dwelling is owned or leased by the taxpayer.

(f) Household goods, furniture, wearing apparel, personal effects but not including televisions, radios, phonographs, tape recorders, more than two (2) firearms, works of art, and other recreational or luxury items.

(g) One horse, one bridle, and one saddle.

(h) All implements of husbandry used upon the homestead.

(i) All ceremonial or religious items.

Sections 136-150. Reserved.

Section 151. Administrative Appeals

Any taxpayer against whom the Tax Commission has assessed taxes, penalties, or interest pursuant to a taxation ordinance of the Cheyenne-Arapaho Tribes of Oklahoma, or who has paid under written protest any taxes, penalties, or interest assessed by the Tax Commission who believes those taxes, penalties, or interest to be wrongfully assessed or collected, may appeal in writing for a full hearing before the Tax Commission under such rules and regulations as the Tax Commission may prescribe.

Section 152. Limitations on Administrative Appeals

Any administrative appeal as provided for in Section 151 of this Title must be begun by filing a written request for a hearing with the Tax Commission within ninety (90) days of the assessment or payment of the taxes, penalties, or interests in controversy, provided that failure to file an administrative appeal shall not prevent the taxpayer from defending any collection action by the Tax Commission in the tribal Court.

Section 153. Exhaustion of Administrative Remedies

(a) Final decision of an appeal pursuant to Section 151 of this Title.

(b) If the Tax Commission shall fail to schedule and hold a hearing on the merits of the administrative appeal within ninety (90) days after receipt of a written request for a hearing unless a delay is requested or approved by the taxpayer.

(c) If the Tax Commission shall fail to issue a written decision on said appeal within thirty (30) days of the hearing on the merits of the taxpayer's administrative appeal.

Section 154. Suits Against the Tax Commission

The Tax Commission, as a governmental agency of the Cheyenne-Arapaho Tribes of Oklahoma, its Commissioners, and employees shall be immune from any suit in law or equity while performing their lawful duties within the scope of the authority delegated to them, PROVIDED, that any taxpayer or other person against whom the Tax

Commission has assessed taxes, penalties, or interest or who has paid under written protest any taxes, penalties, or interest may bring an action in the tribal Court after exhaustion of administrative remedies, to enjoin the Tax Commission from collecting any taxes, penalties, or interest assessed, or for the recovery of any taxes, penalties, or interest paid under written protest which the tribal Court finally determines to have been wrongfully assessed or collected.

Section 155. Limitations on Suits Against the Tax Commission

(a) Any suit against the Tax Commission authorized by Section 154 must be commenced by filing a petition in the tribal Court within thirty (30) days after the date of exhaustion of their administrative remedies.

(b) In no event shall the Court be authorized to award or order the payment of damages or to fashion any remedy except to enjoin the collection or order the return of the amount of the taxes, penalties, or interest in controversy unless an additional remedy is specifically provided by this Title.

(c) All amounts found to be wrongfully collected and refundable shall earn simple interest at five percent (5%) per annum until refunded with interest beginning on the date determination of wrongful collection is made.

Section 156. Refunds to Taxpayers Under Section 151

(a) Whenever any taxpayer shall establish in administrative or Court proceedings that they are entitled to a

refund of any taxes, penalties, or interest previously paid, the Tax Commission shall immediately cause a certified copy of the order and transcript of any administrative action, or judgment of the Court to be filed with the Business Committee.

(b) Upon receipt of such administrative order and transcript, or judgment of the tribal Court, the Business Committee shall "authority to pay" to the account of the Tax Commission such amounts, as may be necessary to pay such refund, from otherwise unappropriated money in the Treasury Tax Account. The Tax Commission shall thereafter issue a refund to the taxpayer. Notwithstanding Section 3(b) appropriations for refunds due may be made from the current collections of the Tax Commission.

(c) When it appears reasonably certain that the taxpayer to whom a refund is due will incur further tax liability within the next twelve months after such refund is due in an amount in excess of such refund, the Tax Commission, in lieu of subsections (a) and (b) of this section, may credit the amount of such refund, with lawful interest, against the future liability of the taxpayer, *provided,* that any amounts not used within twelve months shall be refunded at the request of the taxpayer.

Sections 157-160. Reserved

Section 161. Taxes Erroneously Paid to be Refunded

Taxes erroneously paid due to a mistake of fact or law may be refunded upon application even through [sic] no written protest was made at the time of payment. The taxpayer shall file an application for refund with the Tax

Commission and may appeal the determination of the Commission to the tribal Court.

Section 162. Refunds to Taxpayers under Section 161

(a) Whenever any taxpayer shall establish in administrative or Court proceedings that they are entitled to a refund of any taxes, penalties, or interest erroneously paid under a mistake of fact or law, the Tax Commission shall immediately cause a certified copy of the administrative order and transcript, or judgment of the Court to be filed with the Cheyenne and Arapaho Business Committee for transmittal to the Tribal Council.

(b) Upon receipt of such administrative order and transcript, or judgment of the tribal court, the Business Committee shall request an appropriation from the Tribal Council for the refund of the money erroneously paid due to a mistake of fact or law. If the tribal Council has authorized a ceiling amount for Business Committee appropriations, the Business Committee may appropriate refunds up to the ceiling amount.

(c) When it appears reasonably certain that the taxpayer to whom a refund is due will incur further tax liability within the next twelve months after such refund is due in an amount in excess of such refund, the Tax Commission, in lieu of subsections (a) and (b) of this section, may credit the amount of such refund, with lawful interest, against the future liability of the taxpayer, *provided*, that any amounts not used within twelve months shall be refunded at the request of the taxpayer.

Sections 163-190. Reserved

Section 191. Forgery of Stamps, Et cetera.

Any person who falsely, or fraudulently forges, embezzles, steals, knowingly converts, knowingly misapplies or permits to be misapplied or counterfeits any stamps, tags, licenses, or other instrument evidencing payment of taxes prescribed for use in this Title or who shall use, pass, tender as true, or otherwise be in possession of any unauthorized, false, altered, forged, counterfeited, or previously used instrument for the purpose of evading the payment of taxes imposed by this Title shall forfeit a civil penalty as provided in Section 193 of this Title. Each such counterfeited, embezzled, stolen, converted, misapplied or forged stamp or other instrument shall constitute a separate violation.

Section 192. Offenses

Any natural Indian person who violates any provisions of this Title for the purpose of evading the payment of taxes imposed by this Title shall be guilty of an offense and shall be punished by imprisonment in the tribal jail for a term not to exceed six (6) months or a fine not to exceed Five Hundred (500.00) Dollars or by both such fine and imprisonment.

Section 193. General Penalties

Any person who files any false report or return, or who fails to file any report or return, or who otherwise violates any of the provisions of this Title for the purpose of evading the payment of taxes imposed by this Title

shall forfeit a civil penalty of not more than Five Hundred Dollars (500.00) for each such violation in addition to any other penalties prescribed by law.

Section 194. Referrals for Federal Prosecution

(a) It shall be the duty of all members of the Tax Commission, any police officer, and the tribal Attorney General, upon receiving reliable information that probable cause may exist to believe that any person has violated Section 191 of this Title, to report the facts and circumstances known to him to the appropriate federal officials and to request that a federal investigation be commenced to determine whether 18 U.S.C. Section 1163 has been violated.

Section 195. Banishment

Any natural person or any corporation, partnership, association, company, firm, joint venture, estate, or trust or other person who violates any provision of this Title for the purpose of evading payment of taxes imposed by this Title, in addition to any civil penalties or the civil penalties of seizure and forfeiture imposed by this Title, may be banished and excluded from carrying on any business within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma for a period not to exceed five (5) years, by order of the tribal Court, provided, that such banishment as may be imposed may be suspended by the Judge of the tribal Court conditioned upon strict compliance with all ordinances and laws of the Cheyenne-Arapaho Tribes of Oklahoma. An order of banishment not suspended, shall be operation of law cancel all permits,

licenses, and other authority of the person to carry on any business within the tribal jurisdiction during its term.

Section 196. Cancellation of Leases Upon Banishment

Whenever any person or business is banished and excluded from the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma and the order of banishment is not suspended, and such person or business holds a lease to realty within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma for other than residential purposes, said lease may be cancelled by the lessor within sixty (60) days of the order of banishment at his option by sending written notice to Lessee or his attorney by registered or certified mail, return receipt requested, at his last known address. A true and correct copy of the notice of lease cancellation shall be delivered by certified mail, return receipt requested, to the Superintendent of the Concho Indian Agency, the Business Committee, and the Tax Commission at the same time the notice is sent to the lessee. Such cancellation shall entitle lessor to full use and possession of the premises and render the lease absolutely void from that date forward and shall relieve lessor and lessee from all future obligations under such lease, *provided*, that such cancellation shall not relieve lessor or lessee from any obligation incurred prior to the date of cancellation.

Section 197. Interest

All taxes, fees, or other charges, of the Cheyenne-Arapaho Tribes of Oklahoma not paid when due shall bear interest at the rate of twenty percent (20%) per

annum from the date said taxes or fees become due until the date paid.

Section 198. Commencement of Actions

Filing a written request for refund with the Tax Commission shall commence an action for a refund within the meaning of the Civil Statute of Limitations if such request be diligently prosecuted according to law.

* * *

CHAPTER FOUR

OIL AND GAS SEVERANCE TAX

Section 401. Tax Levied on Oil

There is hereby levied a tax equal to 7.085% of the gross market value of all petroleum or other crude, condensate, or mineral oil produced, severed, saved, and removed from any land within the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma.

Section 402. Tax Levied on Gas

There is hereby levied a tax equal to 7.085% of the gross market value of all gas, natural gas, casinghead gas, and other valuable hydrocarbon substances produced, severed, saved, and removed from any land with the jurisdiction of the Cheyenne-Arapaho Tribes of Oklahoma.

Section 403. Due Date of Tax

The taxes imposed by this Chapter shall be due at the time the taxed substances are produced, severed, saved or removed from the land and shall be payable monthly as provided by Section 404 of this Chapter.

Section 404. Payment of Tax

Payment of severance taxes herein imposed shall be made monthly on or before the last day of the calendar month following the calendar month for which such payment is to be made. Any payment not made when payable as provided herein shall incur a penalty of five percent (5%) of the amount of the tax due and shall bear interest at the statutory rate from the date due until paid.

Section 405. Payment Bonds

(a) Whenever any operator shall habitually fail or refuse to file any required report or pay the tax due on or before the last lawful date for payment the Tax Commission, upon notice and hearing, may require the operator to post a cash or surety bond to guarantee payment of taxes due.

(b) Such bond may be in an amount determined by the Commission to be sufficient to guarantee timely payment of the taxes imposed by this Chapter *provided,* that the amount of such bond shall not exceed the total estimated taxes which will be due in the twelve months period immediately following the giving of such bond.

(c) An order of the Commission requiring a bond pursuant to this section may be reviewed by the Tribal

Court in the same manner that an assessment of taxes may be reviewed.

Section 406. Incidence of Tax – Forfeiture for Nonpayment

(a) The incidence of the tax herein imposed shall be upon the lessee and his successors in interest, hereinafter referred to as the operator, and the taxes herein imposed shall be a lien upon the interest of such operator in the lease from which the taxable substances were produced. Such lien may be foreclosed and the interest of the operator may be forfeited and sold as possessory interests may be forfeited and sold for nonpayment of taxes, subject to subsection (b) of this Section when such taxes remain unpaid in excess of sixty (60) days after the due date for filing of the returns required in this Chapter.

(b) At least thirty (30) days prior to commencement of any forfeiture proceedings, the Tax Commission shall serve notice to all persons known from tribal, Bureau of Indian Affairs, or United States Geological Survey records to be interested in such leasehold of the amount of the taxes due and unpaid, the intent of the Tax Commission to institute forfeiture proceedings, and the right of any of such persons to pay the taxes due on behalf of the operator and recover such payment from him by civil suit. Such notice shall be served personally by the tribal or Bureau of Indian Affairs Police, or by certified United States mail, deliverable to addressee only return, receipt requested, or in any other manner in which a summons may be served. Publication service may be had upon

order of the tribal Court for good cause shown. Publication notice shall be published at least once each full calendar week during the thirty day waiting period in a newspaper in general circulation in [the tribal jursidction [sic] County, Oklahoma and as may be further ordered by the Court.

Section 407. Purchaser May Remit Taxes

Pursuant to the terms of a division order or agreement between an operator and a purchaser of oil or gas approved by the Commission, the purchaser may withhold and pay directly to the Commission the severance taxes due.

Section 408. Unit Operator May Remit Taxes

The Production Operator of any unitized pool or producing field within which the trust or restricted Indian interest has been included under any unit operating agreement approved by the Secretary of the Interior may withhold and pay the severance taxes due on that portion of the production from the units attributable to lands and interests subject to the jurisdiction of the Cheyenne-Arapaho Tribes with the express or implied consent of the lessee.

Section 409. Measurement of Oil and Gas

(a) All crude oil and liquid hydrocarbon substances normally measured in liquid form shall be measured and reported in units either of barrels of 42 U.S. gallons of 231 cubic inches per gallon corrected to standard temperature

and other variables pursuant to the regulations of the United States Geological Survey.

(b) All natural gas and other vaporous hydrocarbon substances normally measured in gaseous form shall be measured and reported in units of one thousand cubic feet (MCF) corrected to standard temperature and pressure pursuant to the regulations of the United States Geologic Survey.

Section 410. Determination of Market Value

The actual sales price of any substances herein subject to taxation, at the discretion of the Tax Commission, may be considered as mere evidence of or conclusive evidence of, the market value of such substances. The Tax Commission shall have the authority to determine the minimum fair market value regardless of the actual sales price of such substances and, in doing so, may consider actual sales prices prevailing for like or substantially similar substances produced and sold in the area and prevailing market prices published in reputable trade journals of the oil and gas industry, *provided*, that any person, firm, corporation, or association against whom additional taxes are assessed due to establishment of such minimum fair market values shall be entitled to a full and fair hearing before the Tax Commission and an appeal to the tribal Court, as is provided by law.

Section 411. Tax Commission May Audit, Correct, and File Reports

The Tax Commission shall have the power and authority to ascertain and determine whether or not any report herein required to be filed with it is a true and correct report of the gross products, and of the value thereof, of such person, firm, corporation, or association engaged in the mining or production of petroleum or other crude condensate or mineral oil and gas, natural gas, casinghead gas, or other valuable hydrocarbon substances. If any person, firm, corporation or association has made an untrue or incorrect report of the gross production or value or volume thereof, or shall have failed or refused to make a required report, the Tax Commission shall, under rules and regulations prescribed by it, ascertain the correct amount of either, and compute said tax. In exercise of this authority, the Tax Commission is specifically authorized to obtain such records as may be available from the Bureau of Indian Affairs, Minerals Management Service and the Bureau of Land Management, the Oklahoma Tax Commission and the Oklahoma Corporation Commission necessary for the purposes and to consider recognized trade journals in determining the market value of produced substances.

Section 412. Form of Reports

[text omitted]

Section 413. Instructions

[text omitted]

* * *

Section 414. Severance Tax in Lieu of Other Taxes

The taxes levied by Sections 401 and 402 of this Title on oil and gas respectively, shall be in lieu of all sales taxes on the first sale of such oil and gas imposed by law, and of any possessory interest taxes on said leasehold attributable to the period during which the oil and gas lease was in production.

Section 415. Exclusion From Taxation

(a) There shall be excluded from the provisions of this Chapter the production attributable to the Indian trust royalty interest, not to exceed 20% of the gross value of such production, of all individually owned and tribally owned lands.

The production attributable to the Indian trust royalty interest need not be included in any of the reports submitted by any oil or gas operators within the tribal jurisdiction and, pursuant to federal law and the tribal constitution, no taxes shall be due or imposed on that portion of the production Attributable to the Indian royalty interest.

Section 416. Stripper Well Exemption

(a) There may be an exemption granted on stripper well production under this code, operators must make application to the Cheyenne-Arapaho Tribes Tax Commission. The exemption will be based on definitions below. The exemption will be on taxes imposed by the oil and gas severance tax under Sections 401 and 402 of this chapter.

(b) Stripper well natural gas is defined as production from a well which did not exceed an average of 60 MCF production per day.

(c) Stripper well oil. Oil produced from a well not producing more than 10 barrels a day of crude petroleum and petroleum condensate.

* * *

RULES OF THE CHEYENNE AND ARAPAHO TAX COMMISSION

CHEYENNE AND ARAPAHO TAX COMMISSION

CHEYENNE AND ARAPAHO TRIBES OF OKLAHOMA
P.O. Box 38
Concho, Oklahoma 73022

RULES AND REGULATIONS

Authority: Unless other specific or additional authority is specifically provided herein, these rules are promulgated and established pursuant to the authority delegated by the Cheyenne and Arapaho Business Committee, pursuant to Article IV of the Constitution of the Cheyenne and Arapaho Tribes of Oklahoma, to the Cheyenne and Arapaho Tax Commission generally by Section 112 and specifically by the other various Sections of the General Revenue and Taxation Act of 1988 enacted by Section 12 of C-A Ordinance R6147001, April 27, 1988.

Source: Promulgated by the Tax Commission _____, filed for record in the office of the clerk of the Tribal Court on _____, and filed for record in the Office of the Secretary/Treasurer on _____. Effective Date _____ unless otherwise noted.

CHAPTER 1 – GENERAL RULES AND REGULATIONS

SUBCHAPTER 1.1 – ADMINISTRATION

Rule 1.1.1: Citation – Effective Date

(a) These Rules shall be known as the Cheyenne and Arapaho Tax Commission Rules, and may be cited as CA-TCR_____.

(b) Pursuant to Section 112(c) of the General Revenue and Taxation Act of 1988, the effective date of these rules shall be the date on which said rule has been filed for record in both the office of the Secretary/ Treasurer and the office of the Clerk of the Tribal Court. In the event that such filing occur on different days, the date later in time shall be the effective date of the rule.

Rule 1.1.2: Definitions

The definitions provided in these rules are provided for the sole purpose of proper interpretation of these Tax Commission Rules and Regulations, and shall be determinative unless a contrary meaning is clear from the context.

(a) The term "The Act" is defined to mean the General Revenue and Tax Act of 1988 as amended to date.

Rule 1.1.3: Effective Scope of Rules and Regulations

All rules and regulations of general application herein promulgated to provide for the Tax Commission's internal operational procedures, to interpret or apply any Tribal tax laws as may be necessary to ascertain or compute the tax owing by any taxpayer, or for the filing of any reports or returns required by any Tribal tax laws, or reasonably necessary for the efficient performance of the Tax Commission's duties, or as may be required or permitted by law, shall be effective throughout the jurisdiction of the Cheyenne and Arapaho Tribes of Oklahoma,

and be in force except as amended, modified, altered or enlarged by rules now in effect or hereafter promulgated by the Tax Commission.

Rule 1.1.4: Principal Office – Hours

(a) The principal office of the Cheyenne and Arapaho Tax Commission is on the Cheyenne and Arapaho Reservation, at the Cheyenne and Arapaho Tribal Offices, P.O. Box 38, Concho, Oklahoma 73022.

(b) Office hours shall be from 8:00 a.m. to 4:30 p.m. each day except Saturday, Sunday, and any legal holiday established by rule, ordinances, or proclamation by the Chairman of the Business Committee.

Rule 1.1.5: Territorial Extent of Commission Operations

The Commission, or any officer or officers exercising its authority, may meet and exercise its official powers and function at any location within the exterior boundaries of the Cheyenne and Arapaho Reservation.

Rule 1.1.6: Communications with Commissions

Every communication in writing to the Commission shall be addressed to the Chairman at the principal office, unless the Commission directs otherwise. Every instrument and other document shall be deposited with or mailed to the Chairman at the principal office, and shall be deemed received only upon actual delivery at the principal office. Filing of any instrument shall not be

complete except upon payment of all applicable fees required by ordinance or by these rules.

Rule 1.1.7: Designation of Agent-Deputy

The Cheyenne and Arapaho Business Committee Secretary, or his designated agent-deputy is hereby authorized to receive and authenticate all documents, papers, or orders required to be filed with the Secretary pursuant to the provisions of the General Revenue and Taxation Act of 1988.

Rule 1.1.8: Adoption of Official Hand Seal

The official hand seal of the Cheyenne and Arapaho Tax Commission affixed herewith, is hereby adopted.

Rule 1.1.9: Establishment of Cheyenne and Arapaho Tax Treasury Account

The Cheyenne and Arapaho Tax Commission hereby authorizes the establishment of an interest-bearing Cheyenne and Arapaho Treasury Account in some federally insured financial banking institution or the Bureau of Indian Affairs. The funds in such account may be invested and reinvested as may be approved by the Business Committee.

Rule 1.1.10: Tax Numbers to be Exclusive

All tax numbers issued by the Cheyenne and Arapaho Tax Commission to each individual, firm, partnership or

organization shall be used by the taxpayer when submitting reports, remittances, or other intercourse with the Cheyenne and Arapaho Tax Commission.

Rule 1.1.11: Territorial Jurisdiction Defined

All laws, rules, and regulations of general application herein promulgated shall be effective and in force throughout the Indian Country located in the territorial jurisdiction of the Cheyenne and Arapaho Tribes of Oklahoma. The Territorial jurisdiction of the Tax Commission shall extend to all territory described as Indian Country within the meaning of Section 1151 of Title 18 of the United States Code lying within the boundaries of the Cheyenne and Arapaho Districts described as follows, to-wit:

> Commencing at the point where the Washita River crosses the ninety-eighth degree of west longitude; thence north on a line with said ninety-eighth degree to the point where it is crossed by the Red Fork of the Arkansas (sometimes called the Cimarron River); thence up said river, in the middle of the main channel thereof, to the north boundary of the country ceded to the United States by the treaty of June 14, 1866, with the Creek Nation of Indians; thence west on said north boundary and the north boundary of the country ceded to the United States by the treaty of March 21, 1866, with the Seminole Indians, to the one hundredth degree of west longitude; thence south on the line of said one hundredth degree to the north boundary of the country set apart for the Kiowas and Comanches by the second article of the treaty concluded October 21, 1867, with said tribes;

thence east along said boundary to the point where it strikes the Washita River; thence down said Washita River, in the middle of the main channel thereof, to the place of beginning.

(b) all dependent Indian communities, irrespective of the tribe or tribe's which may have any ownership interest therein, within the above described borders, or owned by or on behalf of the Cheyenne and Arapaho Tribes of Oklahoma wherever located, unless located within the jurisdictional area of some other Indian Tribe, and including housing units or projects subject to the supervision of any Indian Housing Authority, and

(c) all Indian Allotments the Indian titles to which have not been extinguished including rights-of-way running through the same. For the purpose of enforcement of the Act and these regulations, extinguishment of the Indian title shall mean the extinguishment of all aspects of the trust title held by the United States for the Indian beneficiaries or the removal of all restrictions imposed upon alienation by the United States to protect the Indian beneficiaries. If any interest in the land, whether surface, mineral, water, or otherwise is held in trust or restricted status, the land will be deemed to be within the Indian Country.

* * *

26 Stat. 989
March 3, 1891

CHAP. 543. – An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and ninety-two, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department for the year ending June thirtieth, eighteen hundred and ninety-two, and fulfilling treaty stipulations with the various Indian tribes, namely:

* * *

SEC. 13. The following agreement entered into by the Commissioners named below on the part of the United States, and the Cheyenne and Arapahoe Tribes of Indians on the _____ day of October, eighteen hundred and ninety, and now on file in the Interior Department, signed by the said Commissioners on the part of the United States, and by Left Hand, his mark, and five hundred and sixty-four others, on the part of the said Indians, is hereby accepted, ratified and confirmed to wit:

"Articles of agreement made and entered into at Darlington, in the Indian Territory, on the _____ day of October, A.D. eighteen hundred and ninety, by and between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, commissioners on the part of the United States, and the

Cheyenne and Arapahoe tribes of Indians, in the Indian Territory.

ARTICLE I.

"The said Cheyenne and Arapahoe tribes of Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands enbraced in the following described tract of country in the Indian Territory, to-wit: A tract of country west of the ninety-sixth degree of west longitude, bounded by the Arkansas River on the east, the thirty-seventh parallel of north latitude (being the southern boundary line of the State of Kansas) on the north, and the Cimarron or Red Fork of the Arkansas River on the west and south.

ARTICLE II.

"Subject to the allotment of land in severalty to the individual members of the Cheyenne and Arapahoe tribes of Indians, as hereinafter provided for and subject to the conditions hereinafter imposed, for the considerations hereinafter mentioned the said Cheyenne and Arapahoe Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to-wit:

Commencing at a point where the Washita River crosses the ninety-eighth degree of west longitude, as surveyed in the years eighteen hundred and fifty-eight and eighteen hundred and seventy-one; thence north on a line with said ninety-eighth degree to the point where it is crossed by the Red Fork of the Arkansas (sometimes called the Cimarron River); thence up said river, in the middle of the main channel thereof, to the north boundary of the country ceded to the United States by the treaty of June fourteenth, eighteen hundred and sixty six, with the Creek nation of Indians; thence west on said north boundary and the north boundary of the country ceded to the United States by the treaty of March twenty first, eighteen hundred and sixty six, with the Seminole Indians, to the one hundredth degree of west longitude; thence south on the line of said one hundredth degrees to the point where it strikes the North Fork of the Red River; thence down said North Fork of the Red River to a point where it strikes the north line of the Kiowa and Comanche Reservation; thence east along said boundary to a point where it strikes the Washita River; thence down said Washita River, in the middle of the main channel thereof, to the place of beginning; and all other lands or tracts of country in the Indian Territory to which they have or may set up or allege any right title, interest or claim whatsoever.

ARTICLE III.

Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II hereof, and in part consideration for the cession of lands named in the preceding article, it is agreed by the United States that each

member of the said Cheyenne and Arapahoe tribes of Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held and owned in severalty, to conform to legal surveys in boundary; and that the father, or, if he be dead, the mother, if members of either of said tribes of Indians, shall have a right to select a like amount of land for each of his or her children under the age of eighteen years; and that the Commissioner of Indian Affairs, or some one by him appointed for the purpose, shall select a like amount of land for each orphan child belonging to either of said tribes under the age of eighteen years.

ARTICLE IV.

"It is further agreed that the land in said reservation shall be classed as bottom land and grazing land; and, in making selection of lands to be allotted in severalty as aforesaid, each and every Indian herein provided for shall be required to take at least one-half in area, of his or her allotments, of grazing land. It is hereby further expressly agreed that no person shall have the right to make his or her selection of land in any part of said reservation that is now used or occupied for military, agency, school, school-farm, religious, or other public uses, or in sections sixteen and thirty-six in each Congressional township, except in cases where any Cheyenne or Arapahoe Indian has heretofore made improvements upon and now uses and occupies a part of said sections sixteen and thirty-six such Indian may make his or her selection within the boundaries so prescribed so as to include his or her improvements, or in that part thereof

now occupied and claimed by the Wichita and affiliated bands of Indians described as follows, viz: Commencing at a point in the middle of the main channel of the Washita River, where the ninety-eighth meridian of west longitude crosses the same, thence up the middle of the main channel of the said river to the line of ninety-eight degrees forty minutes west longitude, thence up said line of ninety-eight degrees forty minutes due north to the middle of the main channel of the main Canadian River, thence down the middle of the main Canadian River to where it crosses the ninety-eighth meridian; thence due south to the place of beginning.

"It is further agreed that wherever in said reservation any Indian, entitled to take lands in severalty hereunder, has made improvements and now uses and occupies the land embracing such improvements, such Indian shall have the undisputed right to make his or her selection within the area above provided for allotments so as to include his or her said improvements.

"It is further agreed that sections sixteen and thirty-six in each Congressional township in said reservation shall not become subject to homestead entry, but shall be held by the United States and finally sold for public school purposes. It is hereby further agreed that wherever in said reservation any religious society or other organization is now occupying any portion of said reservation for religious or educational work among the Indian the land so occupied may be allotted and confirmed to such society or organization; not, however, to exceed one hundred and sixty acres of land to any one society or organization so long as the same shall be so

occupied and used, and such land shall not be subject to homestead entry.

"ARTICLE V.

"All allotments hereunder shall be selected within ninety days from the ratification of this agreement by the Congress of the United States, provided the Secretary of the Interior, in his discretion, may extend the *the* time for making such selection, and should any Indian entitled to allotments hereunder fail or refuse to make his or her selection of land in that time, then the allotting agent in charge of the work of making such allotments shall, within the next thirty days after said time, make allotments to such Indians, which shall have the same force and effect as if the selection were made by the Indian.

"ARTICLE VI.

When said allotments of land shall have been selected and taken as aforesaid, and approved by the Secretary of the Interior, the titles thereto shall be held in trust for the allottees, respectively, for the period of twenty-five years, in the manner and to the extent provided for in the act of Congress entitled 'An act to provide for the allotment of land in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes,' approved February eighth, eighteen hundred and eighty-seven; and at the expiration of said period of twenty-five years the titles thereto shall be conveyed in fee simple to the allottees, or their heirs, free from all incumbrances.

"ARTICLE VII.

"As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to lands as aforesaid the United States agrees to pay to the Cheyenne and Arapahoe tribes of Indians one million and five hundred thousand dollars as follows: Two hundred and fifty thousand dollars in cash, to be distributed per capita among the members of said tribes within sixty days after this agreement shall be ratified by the Congress of the United States; two hundred and fifty thousand to be paid out for said Indians under the direction of the Secretary of the Interior, and the remaining one million dollars to be retained in the Treasury of the United States placed to the credit of the said Indians, and, while so retained, to draw five per centum interest per annum, to be paid to said Indians per capita annually.

Nothing herein contained shall be held to affect in anyway any annuities due said Indians under existing laws, agreements, or treaties.

"ARTICLE VIII.

"It is further agreed that wherever in said reservation any member of either of said tribes has in pursuance of any laws or under any rules or regulations of the Interior Department, taken an allotment, such an allotment, at the option of the allottee, shall be confirmed and governed by all the conditions attached to allotments taken under this agreement.

"ARTICLE IX.

"This agreement shall have effect whenever it shall be ratified by the Congress of the United States.

"In witness whereof the said Commissioners on the part of the United States have hereunto set their hands, and the undersigned members of said tribes, for themselves and their tribes, set their hands the day and year first above written.

"DAVID H. JEROME,
"ALFRED M. WILSON,
"WARREN G. SAYRE,
"Commissioners."

Left Hand, his x mark, and five hundred and sixty-four others.

SEC. 14. That for the purpose of making the allotments provided for in said agreement, including the pay and expenses of the necessary special agent or agents hereby authorized to be appointed by the President for the purpose, and the necessary resurveys, there be, and hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, the sum of fifteen thousand dollars, or so much thereof as may be necessary.

SEC. 15. That for the purpose of carrying the provisions of foregoing agreement into effect there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one million five hundred thousand dollars, of which amount the sum of one million dollars shall be placed in the Treasury to the credit of the Cheyenne and Arapahoe Indians, parties to the foregoing agreement, to bear interest at the rate of five per

centum per annum, which interest shall be paid to them per capita annually; the balance of five hundred thousand dollars to be expended as provided for in article seven of said agreement, to be immediately available.

And the sum of two million nine hundred and ninety-one thousand four hundred and fifty dollars be, and the same is hereby, appropriated out of any money in the Treasury not otherwise appropriated, to pay the Choctaw and Chickasaw Nations of Indians for all the right, title, interest, and claim which said nations of Indians may have in, and to certain lands now occupied by, the Cheyenne and Arapahoe Indians under executive order; said lands lying south of the Canadian River, and now occupied by the said Cheyenne and Arapahoe Indians, said lands have been ceded in trust by article three of the treaty between the United States and said Choctaw and Chickasaw Nations of Indians, which was concluded April twenty-eighth, eighteen hundred and sixty-six, and proclaimed on the tenth day of August of the same year, and whereof there remains, after deducting allotments as provided by said agreement, a residue ascertained by survey to contain two million three hundred and ninety-three thousand one hundred and sixty acres; three-fourths of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Choctaw Nation to receive the same, at such time and in such sums as directed and required by the legislative authority of said Choctaw Nation, and one-fourth of this appropriation to be paid to such person or persons as are or shall be duly authorized by the laws of said Chickasaw Nation to receive the same, at such time and in such sums as directed and required by the

legislative authority of said Chickasaw Nation; this appropriation to be immediately available and to become operative upon the execution by the duly appointed delegates of said respective nations specially authorized thereto by law of releases and conveyances to the United States of all the right, title, interest, and claim of said respective nations of Indians in and to said land (not including Grier County, which is now in dispute), in manner and form satisfactory [the] *to* the President of the United States; and said releases and conveyances, when fully executed and delivered, shall operate to extinguish all claim of every kind and character of said Choctaw and Chickasaw Nations of Indians in and to the tract of country to which said releases and conveyances shall apply.

SEC. 16. That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be open to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and town site laws (except section twenty-three hundred and one of the Revised Statess [sic] of the United States which shall not apply): *Provided, however,* That each settler, on said lands shall before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years; But the rights of honorably discharged Union soldiers and sailors

as defined and described in Sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged except as to the sum to be paid as aforesaid, and all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry.

SEC. 17. That before any lands in Oklahoma are open to settlement it shall be the duty of the Secretary of the Interior to divide the same into counties which shall contain as near as possible not less than nine hundred square miles in each county. In establishing said county line the Secretary is hereby authorized to extend the lines of the counties already located so as to make the area of said counties equal, as near as may be, to the area of the counties provided for in this act. At the first election for county officers the people of each county may vote for a name for each county, and the name which receives the greatest number of votes shall be the name of such county: *Provided, further,* That as soon as the county lines are designated by the Secretary, he shall reserve not to exceed one-half section of land in each county to be located near the center of said county, for county seat purposes to be entered under sections twenty-three hundred and eighty-seven and twenty-three and eighty-eight of the Revised Statutes: *Provided,* That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by Legislative enactments, which enactments are hereby ratified, the Probate Judges of said Territory are hereby granted such jurisdiction in

town site matters and under such regulations as are provided by the laws of the State of Kansas.

SEC. 18. That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress may be leased for a period not exceeding three years for the benefit of the school fund of said Territory by the Governor thereof, under regulations to be prescribed by the Secretary of the Interior.

* * *

18 U.S.C. § 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through same.

(2.)

No. 96-853

Supreme Court, U.S.
FILED
FEB 3 1996

In The

Supreme Court of the United States

October Term, 1996

MUSTANG FUEL CORPORATION, ET AL.,

Petitioners,

v.

VIOLA HATCH, ET AL.,

Respondents.

WARD PETROLEUM CORPORATION,

Petitioner,

v.

JUANITA LEARNED, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 3, 1997

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QUESTIONS PRESENTED

1. As a general rule, unless Congress provides otherwise, are allotments of land held in trust by the federal government for members of a federally recognized Indian tribe "Indian country" over which the Tribe retains inherent taxing jurisdiction?

2. Did Congress, in creating trust allotments for members of the Cheyenne-Arapaho Tribe, pursuant to the Allotment and Cession Agreement of 1890, divest the Tribe of jurisdiction to tax activities on the allotments?

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STATEMENT OF THE CASE

On April 27, 1988, the Cheyenne-Arapaho Tribes of Oklahoma (Tribe) enacted a tax on, *inter alia*, oil and natural gas produced, severed, saved, and removed from allotted lands held in trust for tribal members.[1] Pet. App. at 82, 106-113. The purpose of the tax is to "strengthen the tribal government" by "licensing and regulating certain conduct within the tribal jurisdiction," and "to provide financing for expenses of tribal government operations and services. . . . " Pet. App. at 83. Under tribal law, tax revenues must be used for essential governmental services such as tribal courts, law enforcement, roads, and education. Pet. App. at 83-84.

Petitioners conduct oil and gas development operations on lands of the Tribe and on trust allotments of

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[1] The Tribe is a federally recognized Indian tribe organized under a constitution adopted pursuant to the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. §§ 501-509, and approved by the Secretary of the Department of the Interior in 1974.

members of the Tribe.[2] In October, 1988, Petitioners filed suit in federal district court for the Western District of Oklahoma to challenge the Tribe's authority to tax their activities on the trust allotments.[3] The Tribe moved to stay or dismiss, on the ground of failure to exhaust tribal remedies as required by *National Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). By subsequent agreement between the parties, the federal court action was stayed pending exhaustion of tribal remedies and the tax money at issue was escrowed with the federal court for the duration of the litigation. Pet. at 6, 24.

Petitioners first pursued administrative appeals before the Cheyenne-Arapaho Tax Commission. In June 1989 the Commission ruled that it lacked jurisdiction under tribal law to determine the validity of the law that it was charged with enforcing. That decision was final and the appeals were dismissed.

Petitioners then filed suit in the Cheyenne-Arapaho District Court. There the case was submitted on cross-motions for summary judgment on the issue of the Tribe's right under federal law to tax activities on trust allotments. In a written opinion, the Tribal Court granted summary judgment in favor of the Tribe. The Tribal Court concluded that the trust allotments "are now, and always

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[2] The State of Oklahoma also taxes Petitioners' activities on trust allotments. Pet. at 24 n.2. The State's jurisdiction to impose its taxes is not an issue in this case. And, the State's jurisdiction should not affect any determination of tribal jurisdiction here. This Court has upheld taxation of non-Indian activities within Indian country by both tribes and states. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980) (cigarette purchases); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) (oil and gas severance).

[3] Petitioners do not challenge the Tribe's authority to tax their activities on tribal lands. Pet. at 5.

have been a part of the Cheyenne and Arapaho Indian reservation," that the trust allotments are " 'Indian Country' as the term is defined by federal law," and that the trust allotments are "subject to taxation by the tribal government." Pet. App. at 78.

Petitioners appealed to the Tribal Supreme Court, which, in a written opinion, affirmed the Tribe's right to tax Petitioners' activities on trust allotments. The Tribal Supreme Court held that trust allotments are Indian country and therefore that activities on the allotments are presumptively subject to inherent tribal jurisdiction. Pet. App. at 54. The Tribal Supreme Court also held that Congress has not divested the Tribe of its inherent authority to tax the activities of those who chose to do business on trust allotments. Pet. App. at 52.

Petitioners then moved to reopen the action in federal court. The parties again submitted cross-motions for summary judgment. The United States appeared by brief and at oral argument as *amicus curiae* in support of the Tribe's taxing authority. *See* Brief of United States as *Amicus Curiae* (W.D. Okla. filed Nov. 7, 1994). The district court granted the Tribe's summary judgment motion, holding that the Tribe has authority to tax activities on the allotments which have been continuously held in trust by the United States. Pet. App. at 32.

Petitioners appealed and again the United States appeared as *amicus curiae* in support of the Tribe. *See* Brief of United States as *Amicus Curiae* (10th Cir. filed Nov. 20, 1995). The Court of Appeals for the Tenth Circuit affirmed. The Court of Appeals held that as general rule, tribes have jurisdiction over activities on the trust allotments of their members because those lands are Indian country. Pet. App. at 6-7. The Court of Appeals also held that this Tribe was no exception because Congress had never divested the Tribe's inherent jurisdiction over

activities on the trust allotments within the original boundaries of the Tribe's reservation. Pet. App. at 9-10

All four courts that sustained the Tribe's right to tax Petitioners' activities on trust allotments relied on the following history. In 1865 the United States negotiated a treaty with the Tribe to set aside a reservation in what is now Oklahoma and Kansas. Treaty of Oct. 14, 1865, 14 Stat. 703. When it was ratified, Congress required that the treaty be amended to locate the reservation entirely within Oklahoma. 14 Stat. 708. Thus, in 1867 a second treaty was negotiated which defined a reservation wholly in Oklahoma. Treaty of October 28, 1867, 15 Stat. 593. However, the Tribe apparently misunderstood the location of the reservation specified in the 1867 treaty and never occupied it. To address this problem, in 1869, an Executive Order effectuated the 1865 treaty reservation provisions by establishing reservation boundaries coinciding with the territory the Tribe was actually occupying (1869 Reservation). Executive Order of August 10, 1869. *See* Charles J. Kappler, *Indian Affairs, Laws, and Treaties* 839-41; *see also Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665, 666 (10th Cir. 1980).

Pursuant to the General Allotment Act of 1887, 25 U.S.C. §§ 331-349, Congress authorized formation of the Jerome Commission to negotiate allotment and cession agreements with many of the tribes in Western Oklahoma, including the Cheyenne-Arapaho. *See* Act of March 2, 1889, Ch. 412, 25 Stat. 980. In 1890, the United States concluded an Allotment and Cession Agreement with the Tribe. The Agreement was ratified *verbatim* by Congress in the Act of March 3, 1891, 26 Stat. 989. *See* Pet. App. at 120. By the Agreement the Tribe ceded to the United States the lands mistakenly set aside by the 1867 treaty. Then, "subject to" the selection of trust allotments within the boundaries of the 1869 Reservation by individual

tribal members, the Tribe ceded the remaining unallotted portion of the 1869 Reservation.

After the members of the Tribe had selected their allotments, the unallotted lands of the 1869 Reservation were opened to non-Indian settlement in 1892 by Presidential Proclamation No. 23, 27 Stat. 1018. The allotments, however, continued to be held in trust for members of the Tribe. Their trust status remains today. *See* 25 C.F.R. Chap. 1., App. 748-752.

INTRODUCTION

Petitioners seek review of the decision below sustaining the jurisdiction of the Tribe to impose an oil and gas severance tax on activities occurring on the trust allotments of tribal members. The decision addresses the two issues in this case.[4] The first issue is whether, as a general rule, trust allotments are Indian country over which tribes possess inherent sovereign powers, including the power to tax activities conducted within that territory. The second issue is whether any act of Congress excepts the Tribe here from this general rule. Because the Court of Appeals fully considered and correctly decided both the general issue and the specific issue in this case, there is no need for review by this Court.

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[4] Respondents have rephrased the questions presented to more accurately reflect the issues in this case. Respondents' Brief at i.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY FOLLOWED THE GENERAL RULE AS SET FORTH BY CONGRESS AND CONSTRUED BY THIS COURT THAT TRUST ALLOTMENTS ARE INDIAN COUNTRY AND SUBJECT TO TRIBAL JURISDICTION

Petitioners concede that their activities on tribal lands are subject to tribal taxation. Pet. at 5; *see also Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982) (holding that a tribe may tax oil and gas severance activities on an Indian reservation). The general issue presented in this case is whether trust allotments of tribal members are also territory within which activities may be taxed by an Indian tribe.[5] As the Court of Appeals properly held, the starting point for answering this question is to determine whether the trust allotments are "Indian country." Pet. App. at 6. Indian country is the geographic territory over which federal and tribal jurisdiction generally extends and from which state jurisdiction is generally excluded. *See* Felix S. Cohen, *Handbook of Federal Indian Law*, 28, 29-31 (1982 ed.). Based on the definition of Indian country developed by this Court and codified by Congress, the Court of Appeals correctly concluded that trust allotments are Indian country.[6]

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[5] Petitioners "analogize" the issue in this case to a question of state jurisdiction over land which is clearly beyond the state's territorial jurisdiction. Pet. at 27. That analogy is flawed, because it merely begs the question at issue in this case, which is whether trust allotments are within a tribe's territorial jurisdiction.

[6] The issue is whether the trust allotments are "Indian country," not whether they are a "formal" Indian reservation. Because Indian country is broader than formal reservations, *see* 18 U.S.C. § 1151; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991), Respondents do

In *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1993), this Court unanimously and unequivocally held that trust allotments are Indian country. In *Sac and Fox*, a tribe challenged a state's imposition of income and motor vehicle taxes on persons employed and on cars principally garaged within the tribe's territory. 508 U.S. at 120. In its challenge, the tribe relied primarily on the rule of Indian immunity from state taxing jurisdiction on Indian reservations as that rule was set forth in *McClanahan v. State Tax Comm'n of Arizona*, 411 U.S. 164 (1973). *Id.* The state defended on the ground that the Indian immunity rule applied only to "formal" Indian reservations and therefore did not apply to the Sac and Fox Nation, whose territory consisted of parcels of tribal trust land and individual trust allotments. *Id.* at 118. The Court rejected the state's argument, stating:

> . . . our cases make clear that a tribal member need not live on a formal reservation to be outside the State's taxing jurisdiction; it is enough that the member live in 'Indian country.' Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. *See* 18 U.S.C. § 1151.

Id. at 123.

This holding makes clear that for purposes of jurisdiction in federal Indian law, trust allotments are the equivalent of formal reservations and other tribal lands.

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not argue and do not need to argue that the trust allotments are a reservation. *Cf.* Pet. at 23. For the same reason, Petitioners' characterization of the trust allotments as "land outside of a reservation," Pet. at 9, 24, misses the point. Land outside of a reservation may nevertheless be Indian country. 18 U.S.C. § 1151; *DeCoteau v. District County Court*, 420 U.S. 425 (1975).

Hence, like formal reservations, the trust allotments of tribal members are territory over which tribal jurisdiction generally extends. *Accord DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 and 446 (1975) ("Indian allotments, the Indian titles to which have not been extinguished," remain subject to "exclusive tribal and federal jurisdiction").

The decision in *Sac and Fox* followed closely on the heels of another decision by this Court, *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). The Court in *Potawatomi* likewise rejected an argument that tribal territory must be a formal Indian reservation in order for the jurisdictional rules of federal Indian law to apply. In *Potawatomi*, a state tried to sue a tribe to enforce tax assessments on activities that occurred on a parcel of tribal trust land. The state argued that the tribe's sovereign immunity was not a bar to suit because the activities did not occur on a "formally designated 'reservation,' but on land held in trust." 498 U.S. at 511. Rejecting that claim, *Potawatomi* affirmed that "[no] precedent of this Court has ever drawn the distinction between tribal trust land and reservations that [the state] urges." *Id.* Rather, the Court held that:

> In *United States v. John*, 437 U.S. 634, 57 L.Ed.2d 489, 98 S.Ct. 2541 (1978), we stated that the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government."

Id. Because the tribal trust land in *Potawatomi* was "validly set apart," sovereign immunity attached to bar the state's suit against the tribe.

As *Potawatomi* and *Sac and Fox* clarify, the reason that formal Indian reservations are indistinguishable from

tribal trust land parcels and trust allotments, is that these lands all meet the "validly set apart" test, this Court's principle test for determining whether particular territory is Indian country. The "validly set apart" test originated in the Court's earliest determinations of Indian country. In *Donnelly v. United States*, 228 U.S. 243 (1913), the Court held that "nothing can more appropriately be deemed 'Indian country' . . . than a tract of land that . . . is *lawfully set apart* as an Indian reservation." 228 U.S. at 269 (emphasis added). In *United States v. Pelican*, 232 U.S. 442 (1914), the Court held that when a validly set apart reservation is turned into trust allotments for individual tribal members – precisely the type of land at issue here – the trust allotments are likewise Indian country. *Pelican* stated:

> The lands, which, prior to the allotment, undoubtedly formed part of the Indian country, still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by Federal legislation. . . .
>
> In the present case, the original reservation was Indian country simply because it had been validly set apart for the use of the Indians as such, under the superintendence of the government. The same considerations, in substance, apply to the allotted lands which, when the reservation was diminished, were excepted from the portion restored to the public domain. The allottees were permitted to enjoy a more secure tenure, and provision was made for their ultimate ownership without restrictions. But, meanwhile, the lands remained Indian lands, set apart for Indians under governmental care; and we are unable to find ground for the conclusion that they became other than Indian country through

> the distribution into separate holdings, the government retaining control.

232 U.S. at 449 (citations omitted).

Other recent decisions of this Court confirm that trust allotments, like reservations and other tribal lands, are Indian country. *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 115 S.Ct. 2214, 2217 n.2 (1995) (finding that state jurisdiction was excluded within Indian country, which included trust allotments). Indeed, in every case where it has had occasion to do so, the Court has steadfastly held that allotments are Indian country. *Chickasaw*, 115 S.Ct. at 2217; *Sac and Fox*, 508 U.S. at 123; *DeCoteau*, 420 U.S. at 427; *Pelican*, 232 U.S. at 449.[7]

The law of the State of Oklahoma also recognizes the general rule that trust allotments are Indian country. In *Ahboah v. Housing Auth. of the Kiowa Tribe of Indians*, the Supreme Court of Oklahoma stated that "the touchstone for allocating authority among the various governments has been the concept of 'Indian country,' a legal term delineating the territorial boundaries of federal, state and tribal jurisdiction." 660 P.2d 625, 627 (Okla. 1983), *cited with approval in Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114 (1985). The court then stated that, "[i]ndividual trust allotments have long been recognized as Indian country. . . . " *Id.* at 628-29; *see also State ex rel.*

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[7] It is true, as Petitioners point out, Pet. at 26, that cases such as *Sac and Fox* and *Potawatomi* have addressed extensions of state jurisdiction into Indian country, rather than specifically addressing inherent tribal jurisdiction within Indian country. However, these cases are quite relevant to the present case. They are relevant because the rule of Indian immunity from state jurisdiction in Indian country is simply a corollary of the rule of tribal sovereignty. *McClanahan*, 411 U.S. at 168-171 (discussing "the Indian sovereignty doctrine, with its concomitant jurisdictional limitation on the reach of state law").

May v. Seneca-Cayuga Tribe of Oklahoma, 711 P.2d 77, 82 (Okla. 1985) ("a trust allotment is 'Indian country' "); *Lewis v. Sac and Fox Tribe of Oklahoma Housing Auth.*, 896 P.2d 503 (Okla. 1995) (Indian country includes Indian allotments).

In addition to judicial decisions holding that trust allotments are Indian country, since at least 1948, Congress has expressly included trust allotments within the definition of Indian country. The Indian country statute, 18 U.S.C. § 1151, provides in relevant part that Indian country includes:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) *all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.*

18 U.S.C. § 1151 (emphasis added). As explained in the Reviser's note, Section 1151(c) essentially codified this Court's 1914 decision in *Pelican*. *See* Reviser's note, 1948 Act, Title 18 U.S.C.A. at 86 (West 1986).[8]

Hence, when the Court of Appeals below held that as a general rule, "Indian tribes have jurisdiction over lands that are Indian country, and allotted lands constitute Indian country," Pet. App. at 7-8, it was following a long, unbroken line of this Court's controlling decisions and 18

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[8] This brief will discuss the Indian country statute's applicability to civil cases, *infra*, at Part III, Section A.

U.S.C. § 1151. There is thus no basis for review by this Court on this point.

II. THE COURT OF APPEALS CORRECTLY DECIDED THE VERY NARROW QUESTION OF WHETHER CONGRESS HAS DIVESTED THIS TRIBE'S TAXING JURISDICTION OVER ACTIVITIES ON THE TRUST ALLOTMENTS OF TRIBAL MEMBERS

A. The Cheyenne-Arapaho Allotment and Cession Agreement is Not Congressional Divestment of Tribal Taxing Jurisdiction Over Activities on the Trust Allotments

It is well established that among the fundamental powers of inherent tribal sovereignty is the power of taxation. "The power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty. . . . " *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 152 (1980). Tribal taxation powers extend specifically to oil and gas severance activities of non-Indians within tribal territory. *Merrion*, 455 U.S. at 144; *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195 (1985).

Tribes retain their inherent powers "unless divested of [them] by federal law or necessary implication of their dependent status."[9] *Colville*, 447 U.S. at 152. This Court

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[9] Regarding inconsistence with dependent status, "[t]his Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government, as when [1] the tribes seek to engage in foreign relations, [2] alienate their lands to non-Indians without federal consent, or [3] prosecute non-Indians in tribal courts which do not accord the full protections

has firmly upheld inherent tribal taxing authority absent explicit congressional divestment of that authority. In *Merrion*, oil and gas lessees argued that tribal authority to tax their activities on tribal land had been implicitly divested by the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g, and other federal energy legislation and policy. 455 U.S. at 149-152. This Court rejected that argument because the statutes presented no 'clear indications' of congressional divestment. *Id.* at 152.

In *Kerr-McGee*, the issue was whether the Secretary of the Interior must review and pre-approve tribal taxes on business activities on tribal land. The mineral lessee there asserted that such approval was necessary under the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and the Indian Mineral Leasing Act of 1938, 25 U.S.C. §§ 396a-396g. 471 U.S. at 198-200. This Court, admonishing that courts must "tread lightly in the absence of clear indications of legislative intent," *Id.* at 200 (citing *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 53 (1978)), rejected these assertions, finding no such requirement expressly in the statutes.

It is thus clear that unless Congress has expressly divested the Tribe here of its inherent power to tax the activities of Petitioners on trust allotments, that power remains intact. In this case, Petitioners rely solely on the Allotment and Cession Agreement ratified by the Act of

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of the Bill of Rights." *Colville* at 153-54; *accord South Dakota v. Bourland*, 508 U.S. 679, 699 (1993) (Souter, J., dissenting); *see also Duro v. Reina*, 495 U.S. 676 (1990) (tribes lack criminal jurisdiction over Indians who are members of another tribe); *Rice v. Rehner*, 463 U.S. 713, 726 (1983) (liquor regulation). However, the Court in *Colville* held that there is "no overriding federal interest that would necessarily be frustrated by tribal taxation." 447 U.S. at 154.

March 3, 1891, 26 Stat. 989 (1891 Act), for their argument of congressional divestment.

Article I of the 1891 Act addresses the disposition of land which had been designated to the Tribe by treaty in 1865, as amended by treaty in 1867, but which the Tribe had never occupied. Under the terms of Article I, the Tribe unconditionally ceded all of this land. *See* Pet. at 3. This point is not in dispute. Rather, Petitioners hinge their divestment argument on Articles II and III. Pet. at 19-21. These articles address the land which, pursuant to the 1865 treaty, was set aside by Executive Order in 1869 and actually occupied by the Tribe as a reservation (1869 Reservation).

Significantly, both Articles II and III are silent regarding the Tribe's sovereign powers, including the power to tax. Under a strict reading of this Court's cases, that should end the inquiry in favor of the Tribe. "Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence on this point is that the sovereign power to tax remains intact." *Merrion*, 455 U.S. at 148-49 n.14; *see also* Brief of United States as *Amicus Curiae* 10-14 (10th Cir. filed Nov. 20, 1995) (arguing that while the 1891 Act transferred a property interest in the allotments from the Tribe to tribal members, it did not affect the Tribe's sovereign jurisdiction over activities on the allotments).

Petitioners argue, however, that by Articles II and III, the Tribe unconditionally ceded the entire 1869 Reservation and thus lost jurisdiction over all of the 1869 Reservation lands, including lands allotted to and held in trust for tribal members. *See* Pet. at 17-21.[10] The Court of

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[10] If taken to its logical conclusion, Petitioners' theory calls into question the Tribe's jurisdiction even over activities of its

Appeals properly rejected this argument and held that "[t]he plain language of the Act indicates that while the allotted lands were selected from the lands ceded, the allotted lands *themselves* were not ceded." Pet. App. at 10 (emphasis in original).

The Court of Appeals aptly recognized that the telling language in the 1891 Act is in Article II. Article II provides in relevant part:

> *Subject to the allotment* of land in severalty to the individual members of the Cheyenne and Arapaho tribes of Indians, *as hereinafter provided for* and subject to the conditions hereinafter imposed, for the considerations hereinafter mentioned the said Cheyenne and Arapahoe Indians hereby cede, convey, transfer, relinquish, and surrender forever and absolutely, without any reservation whatever, express or implied, all their claim, title and interest, of every kind and character, in and to the lands embraced in [the 1869 reservation].

26 Stat. 989, 1022 (emphasis added).

The term "subject to allotment" modifies the cession language. It makes the cession of some lands expressly conditioned upon the allotment of others, and excludes the trust allotments from the ceded lands. Notably, this critical modifying language appears only in Article II and not in Article I. Thus, Article I is not "identical" to Article II as Petitioners assert. *See* Pet. at 19-20. Unlike Article I,

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tribal members on the trust allotments. This would be contrary to *DeCoteau* wherein this Court stated with respect to a similar Allotment and Cession Agreement that "Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities." 420 U.S. at 428; *accord Solem v. Bartlett*, 465 U.S. 463, 467 n. 8 (1984).

Article II is not an unconditional cession – it is a cession subject to allotment.

Other important language in Article II is the language indicating that allotments would be "hereinafter provided for." This language is important because Article III provides, in relevant part:

> Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by Article II hereof, *and in part consideration for the cession of lands named in the preceding article*, it is agreed by the United States that each member of the said Cheyenne and Arapaho tribes of Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held and owned in severalty. . . .

26 Stat. 989, 1023 (emphasis added). Petitioners argue that the "out of the land ceded" language in Article III operated to cede the allotments. Pet. at 16, 20-21. The Court of Appeals, however, correctly recognized that Article III is not a cession clause. *See* Pet. App. at 10; *see also Solem v. Bartlett*, 465 U.S. 463, 475 (1984) ("isolated phrases" outside the cession clauses are "hardly dispositive" evidence of congressional intent to cede tribal lands). Rather, the court held it is a clause "providing for" the details of the allotment process, such as identifying the land from which the allotments would be selected, the tribal members who would be entitled to select, and the size of the allotments. Pet. App. at 10. This construction of Article III properly harmonizes Article III with Article II.

The Court of Appeals rightly followed this Court's rule that, in interpreting statutes, courts must look to the statutory language and follow its plain meaning. *See, e.g., United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("where, as here, the statute's language is plain,

'the sole function of the courts is to enforce it according to its terms' "). Thus, the Court of Appeals' decision does not merit review by this Court on this point.

Indeed, the Court of Appeals' decision is in accord with *Ahboah v. Housing Auth. of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983), wherein the Oklahoma Supreme Court construed a virtually identical contemporaneous Allotment and Cession Agreement and rejected the precise argument made here by Petitioners. In *Ahboah*, a state housing authority argued that a tribe had "ceded" and therefore lost all jurisdiction over the trust allotments of its members. 660 P.2d at 627-28. The Allotment and Cession Agreement at issue in *Ahboah* stated:

> Subject to the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, . . . the said Comanche, Kiowa and Apache Indians hereby cede, convey, transfer, relinquish and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest of every kind and character, in and to the lands embraced [within the Comanche-Kiowa-Apache reservation].

Id. (citing the Act of June 6, 1900, 31 Stat. 676). The court rejected the housing authority's argument, however, finding no evidence of congressional intent in the Agreement of cession of trust allotments or divestment of tribal jurisdiction over them. *Id.* at 628. The court also found the argument "untenable as it ignores dispositive holdings of the United States Supreme Court," including *United States v. Pelican*. *Id.*

Moreover, although the Court of Appeals here found no occasion to look beyond the language of the 1891 Act, the Act's legislative history supports the decision below. *See Bryan v. Itasca County*, 426 U.S. 373, 381 (1976)

(reviewing legislative history for clear indications that act of Congress divested a tribe of its immunity from taxation). The legislative history clearly shows that the trust allotments were excluded from the ceded land and that the Tribe's jurisdiction over the allotments remains intact.

In a letter regarding the Tribe's Allotment and Cession Agreement, the Jerome Commission, which had been authorized to negotiate with the Western Oklahoma tribes, wrote to the Commissioner of Indian Affairs about the lands that had been retained for the Tribe through its members:

> In order that all claim of title in the Indians might be extinguished we have included in the contract a complete relinquishment of title in and to all the above tracts of country, *saving to the Indian allotments of land in severalty only*, in the reservation created by said Executive Order.

Letter from the Jerome Commissioners to the Commissioner of Indian Affairs (Nov. 13, 1890), *reprinted in* S. Exec. Doc. No. 1, 51st Cong., 2d Sess. 4 (1890) (emphasis added).

The Commissioner of Indian Affairs in turn wrote to the Secretary of the Interior. In describing the agreement between the United States and the Tribe, the commissioner was careful to point out that Article II contained very specific language regarding retaining allotments, whereas Article I did not. The commissioner summed up the agreement as follows:

> By the first article of the agreement the Cheyenne and Arapahoe tribes cede, convey, transfer, relinquish and surrender, forever and absolutely, all their claim, title, and interest of every kind and character in and to the reservation set apart for said Cheyenne and Arapahoe Indians, by the treaty of October 28, 1867 (15 Stats., 593).

> By the second article they cede, convey, transfer, relinquish, and surrender, forever and absolutely without any reservation or condition, express or implied, all their claims, title and interest of every kind and character in and to the land embraced in the reservation set apart for their use and occupation by the executive order of August 10, 1869, *subject to the allotment of land in severalty to the individual members* of the said Cheyenne and Arapahoe tribes of Indians, as provided in the agreement.

Letter from Acting Commissioner R.V. Belt to the Secretary of the Interior (Dec. 1, 1890), *reprinted in* S. Exec. Doc. No. 1, 51st Cong., 2d Sess. 2 (1890) (emphasis added).

Further evidence of intent to exclude trust allotments from the ceded lands can be found in the congressional debate over the 1891 Act. For example, in the Senate, Senator Dawes referred to "six several agreements made by commissioners appointed by the United States to treat with different tribes of Indians for a cession of *portions of their reservations*." 22 Cong. Rec. 3453 (1891) (emphasis added). Among these agreements was the Cheyenne-Arapaho Agreement. *Id.* at 3443.

Likewise, in the House, Representative Perkins explained that:

> [t]he Cheyenne and Arapaho Indians were occupying these lands under an Executive Order . . . [I]t is proposed by Congress to remove the Cheyennes and Arapahoes from *the most of these lands* and open them to settlement. . . . "

Id. at 3718 (emphasis added). Representative Peel stated that:

> the Shawnees [sic] and the Arapahoes have negotiated, as the chairman states, with a commission appointed by the President in pursuance of an act of Congress to negotiate with

> all the Indian tribes in the Indian Territory for any title or claim they may have to any *surplus* lands they may have there, for the purpose of opening them up to white settlement. . . . Among the agreements negotiated was that with the Shawnees [sic] and Arapahoes, who are on a large territory under Executive order, having no title whatever *except the title to allotment.*

Id. (emphasis added). Representative Mansur noted that the Jerome Commission "has made treaties for the *surplus lands* of the following tribes of Indians in Oklahoma Territory . . . Cheyennes and Arapahoes. . . . " *Id.* at 3723 (emphasis added).[11]

The instructions given to the Jerome Commission (Instructions) also confirm that the Tribe was to retain jurisdiction over the trust allotments.[12] The Instructions show that, notwithstanding the cession of some lands, the Western Oklahoma tribes, including the Cheyenne-Arapaho were to retain some form of land base, whether that be a reservation or allotted lands. The Commission was specifically instructed that:

> . . . It will . . . be necessary in the event of successful [cession] negotiations . . . *to provide new reservations* suitable to the requirements of each band within the reservation now occupied by such band, *or to provide for allotments in severalty within the reservations now so occupied.* . . .

Instructions at 92-93; Vol. III, Aplt. App. at 229-30 (emphasis added). Petitioners ignore these specific

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[11] This Court routinely refers to "surplus" lands as "ceded" or "unallotted" lands. *E.g., DeCoteau*, 420 U.S. at 434, 442.

[12] As Petitioners point out, Pet. at 19, Excerpts from the Instructions to the Jerome Commission from the Commissioner of Indian Affairs can be found beginning at page 199, Volume III of the Appellants' Appendix filed in the Court of Appeals. (Aplt. App.)

instructions. Pet. at 18-19; *see also DeCoteau*, 420 U.S. at 446 ("as the historical circumstances make clear . . . the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs").[13]

In sum, the Court of Appeals here reviewed the 1891 Act for any indication that the Tribe's taxing jurisdiction over the activities on trust allotments has been divested. Based on the Act's plain language, the court properly concluded that it failed to show express intent of Congress to divest the tribal jurisdiction.[14] This

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[13] In addition to the Jerome Commission Instructions, Respondents put in the record in this case the following other historical evidence that the Tribe retained jurisdiction over the trust allotments: (1) The negotiations between the Jerome Commission and the Tribe of July and October, 1890. *See* Aplt. App. Vols. III and IV at 232-358; (2) Correspondence relating to the negotiations. *See* Aplt. App. Vol V. at 415-31; and (3) Correspondence regarding the implementation of the 1891 Act. *See* Aplt. App. Vol. V at 432-54. In addition, Respondents submitted testimony by affidavit of Dr. Donald J. Berthrong, a noted historian on the Cheyenne and Arapaho Tribes of Oklahoma, who concluded that the historical circumstances showed the United States' intent to leave "control and influence" over the allotted lands with the Tribe. *See* Affidavit of Donald J. Berthrong, Aplt. App. Vol V at 482-95. *See also* Testimony by Deposition of Dr. Berthrong, Aplt. App. Vols. V and VI at 496-628.

[14] Assuming *arguendo* that there were any ambiguity on this point of statutory interpretation, this Court has developed canons of construction based on the federal trust responsibility to Indians that favor preservation of Indian rights. *See Cohen* at 221-225. Thus, "[o]nce powers of tribal self-government or other Indian rights are shown to exist, . . . federal action which might arguably abridge them is construed narrowly in favor of retaining Indian rights." *Id.*; *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269

conclusion is supported by the 1891 Act's legislative history, the historical circumstances surrounding the Act, and Executive Branch advocacy in this case. *See* Brief of United States as *Amicus Curiae* (10th Cir. filed Nov. 20, 1995). Hence, the Court of Appeals correctly held that the Tribe's jurisdiction at issue here remains intact, and no further review by this Court is necessary.

B. The Court of Appeals' Decision is Narrowly Tailored to Apply Only to Trust Allotments Within the Original Boundaries of the Tribe's Reservation

The Court of Appeals' decision is properly limited to the facts of this case. The Tribe's government has been continuously recognized by the United States government both before and after the 1891 Act. The allotments created by the 1891 Act indisputably are within the boundaries of the Tribe's original 1869 Reservation. The 1869 Reservation was validly set apart for the Tribe by the Treaty of 1865 and the Executive Order of 1869. The trust allotments are and always have been held in trust by the federal government for the Tribe's members since the 1891 Act. Proclamation No. 23, 27 Stat. 1018, 1019 (1892); *see also* 25 C.F.R. Chap. 1, App. 748-752. Petitioners' sweeping assertions that the decision below has novel and far-reaching implications in that it extends tribal jurisdiction to "all land outside of a reservation" is a specious assertion to which this Court should not fall prey. *See* Pet. at 9, 24, 25. Tribal jurisdiction is not limited to "formal" Indian reservations. *Potawatomi*, 498 U.S. 505. Tribal jurisdiction extends generally to Indian country as

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(1992) (finding that ambiguous provisions of Indian statutes are to be construed liberally and interpreted for the benefit of the Indians).

defined by Congress and construed by this Court. The Court of Appeals here did not address land other than the trust allotments – which according to all branches of the federal government are Indian country. 18 U.S.C. § 1151(c); *Sac and Fox*, 508 U.S. 114; *DeCoteau*, 420 U.S. 425; *Pelican*, 232 U.S. 442; Brief of United States as *Amicus Curiae* (10th Cir. filed Nov. 20, 1995).

III. THE DECISION OF THE COURT OF APPEALS THAT TRUST ALLOTMENTS CONSTITUTE INDIAN COUNTRY AS DEFINED BY THIS COURT AND CODIFIED BY CONGRESS IN 18 U.S.C. § 1151 DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT

A. The Decision of the Court of Appeals Does Not Conflict With *Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima*, 903 F.2d 1207 (9th Cir. 1990), *aff'd*, 502 U.S. 251 (1992), or With Any Other Decision of the Ninth Circuit

In *County of Yakima*, the court of appeals was asked to determine whether Section 6 of the General Allotment Act (GAA), 25 U.S.C. § 349, authorized a county to levy and collect *ad valorem* taxes on land within an Indian reservation owned in fee patent by tribes and tribal members. After examining the statutory language and cases interpreting it, the court of appeals held that the GAA manifested "Congress's 'unmistakably clear' intent to permit states to tax fee patented land." 903 F.2d at 1211.

Following this holding, the court of appeals in *County of Yakima* proceeded to examine whether any act of Congress subsequent to the GAA revoked the states' power of taxation. *Id.* at 1214-15. Upon the tribes' suggestion, the court examined the Indian country statute, 18 U.S.C. § 1151 to determine whether it had such an effect.

The court found that it did not. *Id.* at 1215. Specifically, the court stated:

> The Yakima Nation also argues that 18 U.S.C. § 1151 is authority for precluding taxation. This statute defines 'Indian country' for purposes of criminal jurisdiction as encompassing 'all land within the limits of any Indian reservation . . . notwithstanding the issuance of any patent.' 18 U.S.C. § 1151(a). The broad definition of "Indian country" in this statute reflects an attempt by Congress to "remove the uncertainty" as to the limits of federal criminal jurisdiction over Indian territory. . . .
>
> Yet, while we acknowledge that section 1151 governs fee patented land for purposes of criminal jurisdiction, we do not consider section 1151 relevant to the question of whether fee patented land may be taxed by the state. The taxing power is an exercise of the state's civil, rather than its criminal, authority, and is governed by a noncriminal federal statutory scheme of which 25 U.S.C. § 349 is a part. . . . We conclude that 18 U.S.C. § 1151 does not disallow Yakima County's taxing power under 25 U.S.C. § 349.

Id.

Examining this discussion of Section 1151 within the context of the *County of Yakima* case, it is clear that the decision there in no way conflicts with the decision of the Court of Appeals here. In *County of Yakima*, the court of appeals construed Section 1151 essentially to determine whether it restored or "created" tribal immunity from state taxation on fee patented lands where that immunity had been explicitly divested by Congress. Here, however, the Court of Appeals found that the Tribe was never divested of its inherent jurisdiction over the trust allotments in question. Therefore, the Court of Appeals did not need to consider and did not in fact consider whether

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Section 1151 "creates" the Tribe's civil jurisdiction over such lands. Contrary to Petitioners' assertion, Pet. at 11-12, there is thus no conflict with *County of Yakima* on this point.[15]

Moreover, to the extent that the Court of Appeals here relied on Section 1151 as authority in support of tribal civil jurisdiction, the court was absolutely correct for several reasons. Congress has itself used the definition contained in the Indian country statute, 18 U.S.C. § 1151, in a civil context. For instance, the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963, which is a civil statute, expressly refers to and adopts Section 1151's definition of Indian country. 25 U.S.C. § 1903(10). Also, this Court has held that Section 1151 applies to questions of civil jurisdiction. In *DeCoteau*, a case which involved questions of both criminal and civil jurisdiction, the Court held:

> [w]hile section 1151 is concerned, on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction.

420 U.S. at 427 n.2. In *California v. Cabazon Band of Mission Indians*, a regulatory case, the Court reiterated that:

> 'Indian country,' as defined at 18 U.S.C. § 1151 . . . applies to questions of both criminal and civil jurisdiction.

480 U.S. 202, 207 n.5. (1987). Furthermore, this Court has recently applied Section 1151 in purely civil settings. *E.g.*,

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[15] Because the Court of Appeals in this case did not decide whether Section 1151 could create or furnish civil jurisdiction, Petitioners' reliance, Pet. at 11, on a statement in *Pittsburg & Midway Coal Mining Company v. Watchman*, that "§ 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes," 52 F.3d 1531, 1541 (10th Cir. 1995), is misplaced.

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Chickasaw Nation, 115 S.Ct at 2217 n.2; *Sac and Fox*, 508 U.S. at 123. Thus, to the extent that the court of appeals in *County of Yakima* misconstrued this Court's holdings, that is not a basis for review of the decision below in this case wherein the Court of Appeals correctly followed the Court's holdings.

Finally, Petitioners' argument of an alleged conflict with the Ninth Circuit has recently been eviscerated by the recent holding of that circuit in *Alaska v. Native Village of Venetie Tribal Government*, 1996 W.L. 668441 (9th Cir. Alaska). In *Venetie*, the issue was whether a tribe could tax the activities of a non-Indian entity doing business within the tribe's territory. The court stated:

> The ultimate question presented by this case – whether Venetie has the authority to tax activities occurring within its territory – turns on whether Venetie occupies Indian country. . . . To resolve this question, we must first establish the proper standard for determining whether Indian country exists in a given case. Congress has defined Indian country as follows . . . 18 U.S.C. § 1151. This definition applies to both criminal and civil jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987).

Venetie at *3. The decision of the court of appeals in *Venetie* is quite aligned with the decision here.[16]

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[16] Other Circuits have likewise followed this Court's rulings with respect to Section 1151. In *Narragansett Indian Tribe of Rhode Island v. Narragansett Elec. Co.*, 89 F.3d 908 (1st Cir. 1996) the First Circuit followed *Cabazon* and *DeCoteau* to find that "the definition provided in section 1151 'applies to questions of both criminal and civil jurisdiction.' " 89 F.3d at 915. The court went on to cite *Chickasaw* and *Sac and Fox* for the proposition that "elsewhere, the Court has simply defined 'Indian country' in

B. The Decision of the Court of Appeals does not conflict with *General Motors Acceptance Corp. v. Chischilly*, 628 P.2d 683 (N.M. 1981)

Because this Court has settled the question of Section 1151's applicability to civil settings, *Chischilly* also fails to support Petitioners' conflict argument. In *Chischilly*, the New Mexico Supreme Court discussed whether a tribe's civil jurisdiction extended beyond the boundaries of the tribe's formal reservation to other land held in trust for the tribe. 628 P.2d at 684. Responding to an argument that Section 1151 provided authority for such an extension of jurisdiction, the court decided that Section 1151 applied only to instances of criminal jurisdiction. 628 P.2d at 685. The court noted that "while [the footnote in *DeCoteau v. District County Court*] may be read to support [the theory that § 1151 applies to civil jurisdiction], it is ambiguous and the cases cited in support of the statements in the footnote do not refer to any civil application of 18 U.S.C. § 1151." *Id.*

Since this statement was made, however, any ambiguity regarding the *DeCoteau* footnote has been resolved. *See California v. Cabazon Band of Mission Indians*, 480 U.S. at 207 n.5 (stating explicitly that the definition contained in § 1151 "applies to questions of both criminal and civil jurisdiction"). Furthermore, since *Chischilly* was decided, this Court has itself twice applied Section 1151 to purely civil settings. *Chickasaw Nation*, 115 S.Ct. at 2217 (taxing jurisdiction); *Sac and Fox*, 508 U.S. at 123 (same). Thus, to the extent the court in *Chischilly* misunderstood this Court's cases, that is not a basis for reviewing a correct

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civil cases in terms closely parallelling those of section 1151, while citing to that statute." *Id. See also Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 n.10 (10th Cir. 1995).

understanding of the cases exhibited by the Court of Appeals here.

C. The Decision of the Court of Appeals does not conflict with any decision of this Court

Petitioners assert that the decision of the Court of Appeals is inconsistent with *United States v. Oklahoma Gas & Elec. Co.*, 318 U.S. 206 (1943). Pet. at 17, 21-23. Petitioners first argue that *Oklahoma Gas & Elec.* recognized a distinction between "disestablished" and "diminished" reservations. *Id.* Based on this premise, they go on to argue that because the reservation here was "disestablished" and not "diminished," the Tribe lost jurisdiction over the trust allotments of tribal members. *Id.* at 20. However, for two reasons Petitioners' arguments lack merit.

First, this Court uses the terms "diminished" and "disestablished" interchangeably. *E.g., Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *see also Solem v. Bartlett*, 465 U.S. at 475 n.17 ("diminished" . . . [is] a term of art in Indian law"). *Oklahoma Gas & Elec.* does not create any new distinction between the terms. Rather, that case merely determined whether certain Indian allotments constituted a "reservation" within the specific meaning of two rights-of-way statutes, the Acts of February 15, 1901, 43 U.S.C. § 959, and March 4, 1911, 36 Stat. 1235, 1253 (current version at 43 U.S.C. § 9261). But neither *Oklahoma Gas & Elec.* nor the Opinion of the United States Department of the Interior cited by Petitioners, Pet. at 23, which relies largely on the *Oklahoma Gas & Elec.* decision, reached the issue in this case of whether trust allotments are nevertheless "Indian country" and subject to tribal jurisdiction. There is thus no conflict with this case

wherein the question of whether the trust allotments are a "reservation" is a non-issue. *See supra*, n.6.[17]

Second, as the Court of Appeals properly held, the issue of disestablishment is irrelevant to this case. Specifically, the court stated, "disestablishment of the reservation is not dispositive of the question of tribal jurisdiction." Pet. App. at 6. This holding follows directly from cases like *Sac and Fox*, where this Court disregarded a state's contentions that disestablishment was relevant to questions of jurisdiction over parcels of tribal trust land and trust allotments. 508 U.S. at 123; *accord Potawatomi*, 505 U.S. at 511. It also follows directly from *DeCoteau*. Like the Tribe here, the Tribes involved in *DeCoteau* had ceded all their unallotted lands.[18] Although the

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[17] Petitioners also argue, Pet. at 22-23, that the Court in *Oklahoma Gas & Elec.* distinguished the Kickapoo trust allotments in that case from those in cases such as *United States v. Pelican*, on the basis that the Kickapoo reservation had been "dissolved." This point does not resolve this case and underscores Petitioners' failure to address the issue in this case.

The Court in *Oklahoma Gas & Elec.* apparently viewed *Pelican* as holding that the trust allotment there was a "reservation." To the extent it did, that is an incorrect reading of *Pelican*. *Pelican* held that the allotment involved in that case was "Indian country" within the meaning of a specific federal criminal statute. 232 U.S. at 444-449.

Moreover, the issue here is not, as it was in *Oklahoma Gas & Elec.*, whether the trust allotments are a reservation. Nor is the issue whether the Tribe's reservation has been disestablished or "dissolved." The issue is simply whether the Tribe can tax activities on trust allotments. *Pelican* supports the conclusion that it can and *Oklahoma Gas & Electric* is consistent with that conclusion.

[18] Footnote 22 in *DeCoteau* may obscure the similarity between the Sisseton-Wahpeton Agreement at issue in *DeCoteau* and the Tribe's Agreement here. However, close analysis of the

disestablishment or "termination" of the Tribes' reservation in *DeCoteau* did affect the Tribes' jurisdiction on the "non-Indian, unallotted land within the . . . Reservation borders," *id.* at 428, it did not affect tribal jurisdiction on the "Indian allotments, the Indian titles to which have not been extinguished." *Id.* at 427 n.2, 428; *see also Solem v. Bartlett*, 465 U.S. at 467 n.8 ("[r]egardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments").

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Agreements reveals that both tribes retained only allotments to tribal members. Hence, Petitioners' attempt to distinguish the Agreements, Pet. at 15-16, is flawed. Similarly flawed is Petitioners' point, Pet. at 21, 26-27, that allotments were made to individual tribal members, not tribes, when this Court in *DeCoteau* recognized that allotments can "provide an adequate fulcrum for tribal affairs." 420 U.S. at 446; *see also Sac and Fox*, 508 U.S. 114.